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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 400

JACKIE PACKER FRANCIS, A MINOR, DENNIS RAY FRANCIS, A MINOR, AND JAMES BRENT FRANCIS, A MINOR, BY AND THROUGH THEIR GENERAL GUARDIANS, RAY E. FRANCIS AND VIRGIL O. PACKER,

Petitioners,

vs.

SOUTHERN PACIFIC COMPANY, A CORPORATION,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, TENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 400

JACKIE PACKER FRANCIS, A MINOR, DENNIS RAY FRANCIS, A MINOR, AND JAMES BRENT FRANCIS, A MINOR, BY AND THROUGH THEIR GENERAL GUARDIANS, RAY E. FRANCIS AND VIRGIL O. PACKER,

Petitioners,

vs.

SOUTHERN PACIFIC COMPANY, A CORPORATION,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, TENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The Petition of Jackie Packer Francis, Dennis Ray Francis and James Brent Francis, minors, by and through their general guardians, Ray E. Francis and Virgil O. Packer, respectfully shows:

Summary and Short Statement of Matter Involved

The United States Circuit Court of Appeals, Tenth Circuit, contrary to the provisions of Section 721, Revised

Statutes, Title 28, U. S. C. A., Section 725, and the decision of this Court in *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, 114 A. L. R. 1487, denied petitioners the right to have the issues of their cause decided and determined in accordance with the laws of the State of Utah in an action commenced in their behalf to recover damages for the wrongful deaths of their parents which occurred within the State of Utah.

The Circuit Court, contrary to the provisions of the Constitution and statutes of the State of Utah and the decisions of its highest court interpreting, construing and applying the same, held that it was essential to the maintenance of petitioners' wrongful death action that it be made to appear that their deceased parents could have successfully maintained an action to recover damages for the personal injuries caused by the wrongful act of respondent had death not resulted therefrom.

The Circuit Court held that contractual conditions attached to a free pass issued pursuant to the Hepburn Act, 49 U. S. C. A., Section 1(7), to which petitioners were not parties, could be employed to govern, control and determine the nature and extent of their rights in an action for wrongful death created by and arising under the laws of the State of Utah.

The Circuit Court by its decision herein has deprived petitioners of property without due process of law in violation of the Constitution of the United States.

The Circuit Court, contrary to the law as declared by this Court in *Thiel* v. *Southern Pacific Co.*, 328 U. S. 217, 66 S. Ct. 984, has denied petitioners the right of trial by a jury drawn from a cross-section of the community as guaranteed to them by the Constitution of the United States.

Petitioners' action was commenced in the United States District Court for the District of Utah to recover damages for the wrongful deaths of their parents. Mr. and Mrs. Francis, while traveling on passes issued to them by the respondent under the Hepburn Act, 49 U. S. C. A., Section 1(7), were killed in a collision between sections one and two of respondent's regular westbound passenger train No. 21 near Bagley, Utah, on the early morning of December 31, 1944. The trial court, over petitioners' objection and contrary to the laws of the State of Utah, and to Section 721, Revised Statutes, and Title 28, U. S. C. A., Section 725, and the decision of this Court in the case of *Erie Railroad Co.* v. *Tompkins, supra,* refused to submit the issue of respondent's negligence in the operation of its trains to the jury. This ruling was affirmed by the United States Circuit Court of Appeals, Tenth Circuit.

The train collision causing the deaths of petitioners' parents having occurred in the State of Utah, the law of Utah is controlling. *Gerling* v. *Baltimore & O. R. Co.*, 14 S. Ct. 533, 151 U. S. 673, 38 L. Ed. 311; *Northern Pacific Ry. Co.* v. *Meese,* 36 S. Ct. 223, 239 U. S. 614, 60 L. Ed. 467; *Old Dominion S. S. Co.* v. *Gilmore,* 28 S. Ct. 133, 207 U. S. 398, 52 L. Ed. 264; *Nichols* v. *Atchison etc. R. Co.*, 286 F. 1, *affirmed* 44 S. Ct. 353, 264, U. S. 348, 68 L. Ed. 720; *Moss* v. *Pennsylvania R. Co.*, 146 F. (2d) 673, *Cert. den.* 65 S. Ct. 1200, 325 U. S. 861, 89 L. Ed. 1982; *Dawson* v. *McWilliams,* 146 F. (2d) 38; *Roth* v. *Swanson,* 145 F. (2d) 262; *Carter* v. *Kurn,* 127 F. (2d) 415; *Mann* v. *Minnesota Electric Light Co.*, 43 F. (2d) 36.

In determining the nature, characteristics and extent of petitioners' rights herein, the District Court and the Circuit Court of Appeals refused to follow the law of Utah as

provided in Section 5, Art. XVI, Constitution of Utah, and Section 104-3-11, Utah Codes Annotated, 1943, and as declared and established by the Utah Supreme Court in *Halling* v. *Industrial Commission of Utah*, 71 Utah 112, 263 Pac. 78; *Mason* v. *Union Pacific R. Co.*, 7 Utah 77, 24 P. 796; *Morrison* v. *Perry*, 104 Utah 151, 140 P. 2d 772.

From the affidavits filed in support of the motion for new trial it was conclusively shown that the District Court discriminated against members of organized labor in the selection of jurors. In the year 1944 three were called for jury service from a Union membership of 32,129; in 1945 four were called from a membership of 31,156; and in 1946 from a membership of 31,389 four were called. During these years a total of 826 were called for service, and amongst those were twenty-nine bankers, eighteen insurance men and fifty-two merchants. The adverse ruling of the District Court on this issue was affirmed by the Circuit Court of Appeals. This ruling effectively deprived petitioners of the right of trial by a jury drawn from a cross-section of the community, guaranteed them by the Constitution of the United States as defined by this Court in the case of *Thiel* v. *Southern Pacific Co., supra.*

Jurisdictional Statement

The jurisdiction of this Court to review the decision of the United States Circuit Court of Appeals, Tenth Circuit, is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, Title 28, U. S. C. A., Section 347(a), for the following special and important reasons:

(a) The Circuit Court of Appeals by its decision herein in an action arising under and controlled by the Constitu-

tion and statutes of the State of Utah, has decided an important question of law in conflict with applicable and controlling decisions of the Supreme Court of the State of Utah.

(b) The Circuit Court of Appeals by its decision has deprived petitioners of property without due process of law in violation of the Constitution of the United States.

(c) The Circuit Court of Appeals by its decision has decided an important question of law in a manner contrary to the decisions of this Court in the case of *Thiel* v. *Southern Pacific Co., supra.*

Opinion of the Court Below

The opinion of the Circuit Court of Appeals, Tenth Circuit, dated July 9, 1947, is not yet officially reported but may be found in the record commencing at page 273. The case on appeal was heard by Judges Bratton, Huxman and Murrah. On August 11, 1947, and within the time permitted by the Rules and special order of the Tenth Circuit Court of Appeals, petitioners filed their Petition for Rehearing and Brief in Support Thereof. A true copy of said petition and brief may be found in the record commencing at page 283. The petition for rehearing was denied on August 20, 1947 (R. 329). This petition for certiorari was filed on the 14th day of October, 1947.

Questions Presented

The questions presented are:

1. Whether or not the United States Circuit Court of Appeals, Tenth Circuit, in an action which arose under and was governed by the law of the State of Utah, properly construed and applied Section 5, Article XVI of the Con-

stitution of the State of Utah and Section 104-3-11, Utah Code Annotated, 1943, as interpreted and construed by the Supreme Court of the State of Utah in *Halling* v. *Industrial Commission of Utah, supra; Mason* v. *Union Pacific R. Co., supra;* and *Morrison* v. *Perry, supra.*

2. Whether or not the Circuit Court of Appeals by its decision herein has wrongfully deprived petitioners of property without due process of law in violation of the Constitution of the United States.

3. Whether or not the Circuit Court of Appeals by its decision herein has affirmed and approved an unwarranted discrimination against members of organized labor in the selection of the jury panel by the Federal District Court of Utah.

4. Whether or not the practice and method of selecting the jury panel as followed in the trial court had the effect of depriving petitioners of trial by a jury drawn from a cross-section of the community as guaranteed them by the Constitution of the United States.

Reasons Relied On for Allowance of Writ

The Circuit Court of Appeals has decided an important question of law arising under and controlled by the statutes and constitutional provisions and decisions of the Supreme Court of the State of Utah in a way not in accord with the applicable decisions of the Supreme Court of the State of Utah and this Court.

In determining the nature and extent of petitioners' rights in an action for the wrongful deaths of their parents which occurred within the State of Utah, the Circuit Court of Appeals declared: *"It is essential to the maintenace of the action that the wrongful act or default be of such character that the decedent could have maintained an action to*

recover damages for his injury if death had not ensued" (R. 275). This holding is contrary to and in conflict with the decisions of the Supreme Court of Utah in *Halling* v. *Industrial Commission of Utah, supra,* and to the provisions of Section 5, Article XVI, Constitution of Utah, as amended, and to Section 104-3-11, Utah Code Annotated, 1943. In the *Halling* case, the Supreme Court of Utah declared: *"We are therefore of the opinion that the wife and minor children of Mariner Halling did not, and could not, derive any claim for compensation through the deceased, but their claim is separate and independent of any claim deceased may have had during his lifetime"* (R. 304). The Utah Court held that Halling during his lifetime was powerless to encumber, restrict, abrogate or limit the right of action for wrongful death created by the Constitution and statutes of the State of Utah for the benefit of his dependent heirs, and that the right of heirs to recover for the wrongful deaths of ancestors is not the result of contract but a constitutional right which cannot be denied, and that any wrongful abrogation of this right constitutes a deprivation of property without due process of law. See 71 Utah, pp. 121, 122.

By its decision herein the Circuit Court of Appeals employed a contractual condition to which petitioners were not parties to defeat their action to recover for the wrongful deaths of their parents.

The Circuit Court of Appeals in its decision approved and affirmed an unwarranted practice followed by the Court in the selection of juries the effect of which was to deprive petitioners of their right of trial by a jury selected from a cross-section of the community contrary to the decision of this Court in *Thiel* v. *Southern Pacific Co., supra.*

It is therefore essential that a Writ be granted in order to determine the important questions of law above referred to and to likewise determine important questions relating

to the construction, interpretation and application of the Federal Statute known as the Hepburn Act, 49 U. S. C. A., Section 1(7) and specifically to determine whether or not Congress in the enactment of the Hepburn Act intended to limit, modify, control or abrogate rights of action for wrongful death, created by the constitutional and statutory provisions of the various States.

If it should be determined that Congress by the enactment of the Hepburn Act did intend to limit, modify, control or abrogate such rights of action, it should be determined whether Congress intended to permit railroad companies and their employees to limit, modify, control or abrogate such rights of action by the simple expedient of attaching contractual conditions to passes issued to employees pursuant to the Act. If it should be determined that Congress intended either or all of the results above mentioned, then it should be determined whether or not Congress has acted in excess of its constitutional grant of authority.

Prayer

WHEREFORE, your petitioners pray that a Writ of Certiorari be issued out of and under the seal of this Court directed to the United States Circuit Court of Appeals, Tenth Circuit, commanding said Court to certify and send to this Court the transcript of the record in the case entitled Jackie Packer Francis, a minor, Dennis Ray Francis, a minor, and James Brent Francis, a minor, by and through their general guardians, Ray E. Francis and Virgil O. Packer, Appellants, vs. Southern Pacific Company a Corporation, Appellee, No. 3424, including also the proceedings in said United States Circuit Court of Appeals to the end that said cause may be reviewed and determined by this Court and the judgment of the United States District

Court, for the District of Utah, and the judgment of the United States Circuit Court of Appeals, Tenth Circuit, be reversed and the cause remanded for further proceedings according to law.

JACKIE PACKER FRANCIS,
A Minor,
DENNIS RAY FRANCIS,
A Minor, and
JAMES BRENT FRANCIS,
A Minor, by and Through
Their General Guardians,
RAY E. FRANCIS *and*
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 400

JACKIE PACKER FRANCIS, A MINOR, DENNIS RAY FRANCIS, A MINOR, AND JAMES BRENT FRANCIS, A MINOR, BY AND THROUGH THEIR GENERAL GUARDIANS, RAY E. FRANCIS AND VIRGIL O. PACKER,

Petitioners,

vs.

SOUTHERN PACIFIC COMPANY, A CORPORATION,

Respondent

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opinion of the Court Below

The opinion of the Circuit Court of Appeals, Tenth Circuit, dated July 9, 1947, is not yet officially reported but may be found in the record commencing at page 273.

Grounds on Which Jurisdiction of Supreme Court of the United States Is Invoked

The judgment of the Circuit Court of Appeals, Tenth Circuit, was made and entered on the 9th day of July, 1947 (R. 280). Petition for Rehearing was denied on August 20,

1947 (R. 329). Petition for Writ of Certiorari was filed on 14th day of October, 1947. The judgment of the Tenth Circuit Court of Appeals is based upon its application of the United States Statute commonly called the Hepburn Act, 49 U. S. C. A., Section 1(7) (Feb. 4, 1887, c. 104, Sec. 1, 24 Stat. 379; June 29, 1906, c. 3591, Sec. 1, 34 Stat. 584; Apr. 13, 1908, c. 143, 35 Stat. 60; June 18, 1910, c. 309, Sec. 7, 36 Stat. 544; May 29, 1917, c. 23, 40 Stat. 101; and Feb. 28, 1920, c. 91, Secs. 400-403, 41 Stat. 474-479), and Section 5, Article XVI of the Constitution of the State of Utah, and Section 104-3-11, Utah Code Annotated, 1943. The jurisdiction of the Supreme Court of the United States is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, Title 28, U. S. C. A., Section 347(a).

Statement of the Case

This action was instituted in the District Court of the United States, for the District of Utah, Central Division, to recover damages for the wrongful death of petitioners' parents. The jury returned verdicts in favor of respondent and judgment was immediately entered thereon (R. 16).

Jack R. Francis, a conductor and brakeman in the employ of respondent, and his wife, Delphia Packer Francis, were killed as the result of a collision which occurred when the second section of respondent's westbound passenger train No. 21 ran into the rear end of the first section of said train near Bagley, Utah at about 5.14 A. M. December 31, 1944. Mr. and Mrs. Francis were occupying a pullman berth in the rear car of First 21. They were traveling on passes issued by respondent, containing the following conditions:

> "This free pass is not transferable, will be taken up and forfeited if presented or used by a person not designated on its face, and is subject to revocation at any time without notice. In its use the user assumes

all risk of injury to person or property and of loss of property whether by negligence or otherwise, and absolves the issuing company and its officers and employes from any liability therefor. Use hereof in violation of any law is prohibited."

The main line tracks in the vicinity of the accident are straight and extend almost due east and west. The movement of traffic over these tracks is controlled by block signals. The signals material here proceeding from east to west are numbered: 7659, 7649, 7639 and 7629. The point of collision was approximately 2458 feet west from Signal 7639; the distance between Signals 7649 and 7639 is 5688 feet, and between Signals 7649 and 7659, 4509 feet (R. 63).

Three westbound trains were involved in the accident.

At approximately 4:12 a. m., on December 31, 1944, respondent's westbound Freight No. First 581, a double header, departed from Ogden, Utah (R. 68). As First 581 proceeded into Bagley, Utah, all block signals ahead were observed to be in clear position displaying green (R. 68). Engine trouble developed while the train was moving between Signals 7639 and 7629 which necessitated a stop on the main line tracks, where the train remained until after the collision (R. 68, 69). Westbound passenger train, No. First 21, consisting of a locomotive and eighteen passenger cars (R. 64), departed from Ogden at 4:38 a. m. (R. 60). As it moved west the engineer, in accordance with his duty, watched the block signals and when the engine reached a point five or six car lengths from signal 7649, he observed it to be in stop position displaying red. He immediately made a heavy service application of the automatic air brakes which brought the train to a stop about midway between Signals 7649 and 7639 (R. 74, 75).

According to company operating rules, well understood by all enginemen it is the duty of the engineer and fireman to keep a sharp lookout for all controlling block signals and

whichever observes the signal first must at once call out its aspect. It is the duty of the other to repeat the call audibly. According to these rules a train must be brought to an immediate stop responsive to a block signal in stop position displaying red, or whenever the aspect of any signal is undiscernible to the crew when passed (R. 70). Block signals are relied upon to keep trains traveling in the same direction over the same tracks properly and safely separated. The three trains involved here were being operated over the same main line tracks in the same direction under the protection of block signals (R. 64, 74). These block signals are constructed on the overlap principle. The two signals immediately to the rear of any standing or moving train are actuated by it and will automatically assume a stop position and display red (R. 66).

When First 21 approached Block Signal 7649, that signal and Signal 7639 as well were in stop position displaying red (R. 75) being actuated by First 581 which was standing between Signals 7639 and 7629. This afforded approaching train No. First 21 all of the 5688 feet of distance between signals 7649 and 7639, within which to make a safe stop in addition to the space between signal 7639 and the rear end of First 581. Engineer Ware of First 21, after bringing his train to a stop, proceeded forward in accordance with the safety rules at a speed of from 8 to 12 miles an hour, keeping a close lookout ahead so that he could stop the train immediately if necessary. The flagman from the stalled freight train was at Signal 7639 when First 21 reached that point. He boarded the locomotive and the train proceeded westward until the markers of the caboose on the rear end of the freight train became visible. When the locomotive was about four or five car lengths from the rear of the caboose, the engineer made a move to apply the air brakes, but at that very instant Second 21 crashed into the rear of First 21 and the brakes of the latter train were at once set

automatically in emergency. About two car lengths of space separated the locomotive from the rear end of the stalled freight train when First 21 came to a final stop (R. 75, 76).

Second 21, consisting of a locomotive, 18 baggage cars, a boxcar and coach, left Ogden, westbound, at 4:50 a. m. McDonald was the engineer and Hardman the fireman (R. 83, 84). Just before arriving at Little Mountain which is to the east of Block Signal 7659, there was a slight application of the air brakes to slow the train down for the curve there, but the air brakes were kicked off again by McDonald as soon as the train got around the curve (R. 89). It was foggy and McDonald did not call out the aspect of Signal 7659 as required by the rules. Hardman could not see it and so informed McDonald. McDonald replied "O. K., I got her" (R. 86). McDonald's reply and conduct were in violation of Rule 294 (R. 132). When the engine passed Signal 7649, Hardman was unable to see it, and McDonald did not call its aspect. Hardman stated that he could not see the signal and McDonald again in violation of Rule 294 said "I got her" (R. 86). Block Signal 7649 at that time was in stop position displaying red, as it was when First 21 went by a few minutes earlier. This fact has always been admitted and accepted by all parties to this suit. In the vicinity of this block signal McDonald applied the air but the brakes were evidently released by him—otherwise the train would have been brought to a stop (R. 89, 90, 93). The train proceeded onward at an unreduced speed until it approached signal 7639 (R. 90). Hardman observed this signal in stop position displaying red and called out to McDonald that the signal was red and frantically proceeded to prepare the locomotive for the emergency (R. 87, 88). He did not know whether McDonald made any response to his call of the signal, but thought he did not (R. 87). Hardman's frantic and frenzied reaction

to the red signal to a great extent belied the inference of his testimony that this was the first red block passed by the train that he knew of. If Hardman had thought that this was the first red block passed he would have known that there was no danger to be encountered within the mile of space between it and the next one to the west, and that the train could be brought to a stop from a speed of 65 miles an hour within half of that distance. But what did he do? He frantically proceeded to cut the fire, open the blower, cut the water pump and to do everything else to prepare the locomotive for the catastrophe which he evidently believed was about to overtake them. He paid no attention to McDonald and of course did not know whether the engineer made any response or not.

It is interesting to compare Hardman's reaction to his observance of Block Signal 7639 in stop position and that of the engine crew in First 21 when Block Signal 7649 was observed to be in the same position. Engineer Ware merely shut off the throttle and made a heavy service application of the automatic brakes. The train came to a stop midway between 7649 and 7639 and then proceeded on at a reduced speed in accordance with the rule (R. 75-77). Not so with Second 21. The very conduct of Hardman shows more conclusively than any evidence which could be otherwise produced that he expected the locomotive to come into violent collision with the other train at once and perhaps before he could get the fire shut off. He knew that there was no mile of clear tracks ahead. The work of preparing the locomotive for the impending catastrophe did not require more than ten seconds and Hardman then observed the markers on the rear of First 21 and the crash came (R. 88).

The most serious contention made by respondent was that McDonald was not negligent for the reason that he was either dead or incapacitated at the time Second 21 passed the second red block. Petitioners contended in the trial

court and in the Circuit Court of Appeals and still contend that even conceding this point, which they most certainly do not, they should still prevail even on the theory submitted to the jury. It is firmly established by undisputed evidence that McDonald failed to take action to stop the train when Signal 7649 in stop position displaying red was reached as required by the most compelling and inflexible rule of railroading, namely, the rule which requires an immediate stop in obedience to the command of a red block (R. 66, 67, 70, Rules 293, 294, 505, 509J, 509F, 509K—R. 132-133). That McDonald failed in the performance of this imperative duty is clearly indicated by his "I got her" response to Hardman's report that he could not see the signal. McDonald "got her" and the signal was red. Certain it is that he was alive at that point and presumably capable of setting the air. That he was physically capable of complying with the command of the red block when the train passed Signal 7649 is fully revealed by Hardman's testimony. He stated at Record 89 and 90 that soon after this block was passed McDonald applied the air brakes and then released them.

"Q. Now, proceeding there right on to the point of impact, was that air applied again?

A. Yes, sir.

Q. And, who applied it?

A. Mr. McDonald.

Q. Can you state approximately where that took place?

At the signal, block signal in between Little Mountain and Bagley.

Q. Now, you have stated there are three signals there?

A. Yes, sir.

Q. Can you state approximately where that would be in relation to these signals?

A. I would say it was almost the middle signal.

Q. That would be for the purpose of discussing, Signal 7649.

A. Yes, sir; to my knowledge.

Q. Was the air-brake released after that?

A. It presumably was, otherwise we would have stopped."

It thus appears that McDonald's failure was not in neglecting to apply the brakes when the train passed the first block signal in stop position displaying red, namely 7649, but in releasing the brakes after setting them, and that if he had not released these brakes the train would have been brought to a stop short of collision. It is difficult to conceive of conduct more worthy of designation as wilful and wanton than that shown by this testimony.

In support of the contention that McDonald was dead when the train reached and passed Block Signal 7639, respondent offered in evidence the testimony of Drs. Frank B. Queen and Orin A. Ogilvie. Dr. Queen performed an autopsy on McDonald's body shortly after his death (R. 160), and stated it to be his opinion that the cause of death was coronary occlusion and heart failure. Neither of the doctors were able to give an opinion supported by their findings or the anatomical report except that McDonald was dead when the steam from the broken pipes in the cab of the locomotive reached his body. They were unable to state whether he died a second or any other length of time prior thereto. Queen testified that McDonald could have suffered from such fright or shock upon suddenly realizing that the collision was certain as to bring on the fatal heart attack. He also stated that such fright could have aggravated the existing heart condition to the point of death.

Petitioners seriously contend that any inference which might be drawn from the doctors' testimony to the effect that McDonald was either dead or incapacitated when Second 21 passed Signal 7639 was completely dissipated and de-

stroyed by other testimony, testimony which proved beyond peradventure that McDonald was not only alive when Block Signal 7639 was reached but that he set the air brakes on Second 21 at that time or shortly thereafter.

Conductor Welch (R. 118), head brakeman Russell (R. 95), rear brakeman Altman (R. 106), and Express Messenger Cook (R. 127) were riding in the rear car of Second 21 as that train proceeded westward from Ogden. Each of these men experienced and observed the effects of a heavy application of the air brakes on the train some twelve seconds at least before the crash occurred.

Conductor Welch:

> "The first application of the brakes that I noticed after we left Ogden was in the vicinity of the wreck at Bagley. * * *" (R. 118). "I was sitting near the middle of the car with my feet over on one seat and sitting in the other with a clipboard in my hand writing, doing my book work. There was a heavy application of the air and I grabbed my right-hand grip of the seat and held on, and after a short period of time there was three distinct and separate lunges forward. * * *" (R. 119).

Head Brakeman Russell:

> "The air was applied with a heavy service application" (R. 95, 96).

Rear Brakeman Altman:

> "* * * I was shifting the aluminum cup from hand to hand; it was still too hot to drink when the brakes applied * * *. I satisfied myself we were coming to a stop and I put the cup of coffee on the seat in front of me and stood up and reached for my coat and the shock came" (R. 107).

Express Messenger Cook:

> "* * * And while I was writing, I felt this application of air and heard it and I stopped writing and

glanced out the window expecting to see some sort of settlement, I suppose, lights of some kind, because I expected us to come to a stop. And as I watched out the window a red flare passed and soon after we passed it we made the first impact" (R. 127, 131).

After the application of the brake power was first felt the two brakemen waited for a moment or two to determine whether or not the train was going to be stopped or merely slowed down, and reaching the conclusion that it was going to be stopped they commenced preparations for the performance of their duties and were so engaged at the time of the collision. Russell stood up in the aisle, reached for his coat and was putting it on when the first shock came (R. 86). Altman had poured coffee from his thermos bottle into a cup and because of the heat was passing the cup from one hand to the other when he felt the application of the air brakes. He paused a moment or so to determine whether or not the train was going to be brought to a complete stop, decided that it was, set his cup down, stood up and was standing in the aisle near Russell when the first shock came (R. 107). Altman was personally interested in determining whether or not the train was going to be stopped, if merely slowed down it would be Russell's duty to make the check, if brought to a complete stop it would be his duty to dismount and proceed back to protect by flagging (R. 107). He stood up in the aisle when he finally became convinced that the train was to be stopped and not merely slowed down (R. 107).

Cook estimated the amount of time elapsing between the application of the air brakes and the crash as being something less than a minute—perhaps about a half minute (R. 128).

Russell and Altman, at a hearing held shortly after the disaster, were timed while they reenacted the movements made by them between the application of the brakes and

the first shock. The elapse of time so determined was approximately twelve seconds (R. 96, 107). This first shock caused Cook to be pushed down into the seat (R. 127), it knocked Russell to the floor (R. 96), and caused Altman to be thrown violently against Russell and into the seat (R. 107). Then came the second shock which thrust Cook onto the floor between the seats (R. 107), it had no particular effect on Russell because he was already on the floor (R. 96), but knocked Altman down (R. 108). All of these men experienced a third shock when the car in which they were riding finally came to rest (R. 96, 108, 127). Conductor Welch testified that at the time of the three separate shocks, or lurches as he described them, he was holding onto the seat and they had no particular effect on him (R. 119).

After the cars came to rest, it was discovered that the first nine cars immediately behind the engine on Second 21 were turned over and pushed off the right of way. The tenth car was standing upright and completely derailed, the forward trucks only of the eleventh car were derailed. The remaining nine cars were still on the tracks (R. 117) firmly wedged against the wreckage ahead. The engine of Second 21 had crashed into the rear car of First 21, the car in which Mr. and Mrs. Francis were riding (R. 114). At least two cars in First 21 were telescoped (R. 115). Fifty people were killed, eighty-five injured.

Simon Morton Welsh, a conductor and brakeman of many years' experience, was called as an expert witness by petitioners. He testified that a sudden application of automatic air brakes in emergency on a passenger train traveling at a speed of from 60 to 65 miles per hour would not produce any perceptible shock whatsoever due to the train's momentum (R. 151, 152). He further testified that there would be approximately 7 feet of slack in a 20 car passenger train (R. 148) and that if such a train while traveling at a speed of 60 miles an hour or thereabouts should collide with

a standing or moving train the slack would run in, in not to exceed one-tenth of one second (R. 153). He stated that in his opinion the shock caused by a rear-end collision between a train traveling between 40 to 65 miles per hour and one either stopped or moving slowly in the same direction would be entirely dissimilar and unlike the retarding effect produced by the setting of brakes in emergency on a train traveling 60 to 65 miles per hour. It was his opinion that such a collision would produce at once a severe shock, a shock similar to that which the witnesses described as having occurred some twelve seconds after they experienced the effects of the application of the air brakes. He testified that even though a collision such as that which caused the deaths of petitioners' parents would undoubtedly set the air brakes in emergency on the trains involved, the retarding force and effect of such brake application would be entirely dissipated by the tremendously greater retarding force and power of the collision and would be entirely imperceptible to people riding on the approaching train (R. 153). This testimony is understandable. The ratio of the retarding power and corresponding perceptible effect produced by the application of train brakes would depend on the weight of the train and its momentum. The greater the train speed the less the retarding power of the brakes and perceptible effect produced by their application. The application of automatic train brakes in emergency on a slowly moving train by overcoming at once practically all of the train's momentum could well produce a shock of sufficient severity to knock trainmen down and do great damage to train equipment where the same application of brakes on a train moving in excess of 60 miles per hour would produce no perceptible shock or damage whatsoever. Not so with a collision. It is submitted that the speed and momentum of the trains involved in a collision would determine the destructive force, effect and shock produced and

caused thereby. A collision between trains moving between one to two miles per hour would likely not produce any considerable damage, but a collision occurring on a straight track between a train stopped or moving slowly and one approaching from the rear at a speed of from 40 to 65 miles an hour would be expected to cause great damage and destruction and likewise produce at once a severe shock throughout the whole length of the train, a shock sufficient to knock men down and to produce all of the results described by Altman, Russell and Cook. It would be strange indeed if the immediate effects of such collision were in all respects similar to the retarding effect produced by the ordinary application of air brakes. It would be most unusual if the effects were such that during the first twelve seconds after the occurrence men in the rear car of the speeding train could safely and without difficulty stand in the aisle, put on coats, pass a cup of coffee from hand to hand not knowing whether the train was going to be stopped or merely slowed down and then knocked flat by the first shock produced by the collision. It is submitted that immediately upon the occurrence of the collision in this case, the retarding force and effect of the automatic air brakes on Second 21, whatever it was, became insignificant and inconsequential and entirely submerged in the tremendously greater retarding force produced by the collision itself. The conclusion, therefore, seems irresistible that the sensations experienced by the four men in the rear car of Second 21 some twelve seconds prior to the first crash or shock could not have been caused by the collision between Second and First 21. They experienced the effects of the natural retarding force of normally applied brakes. It was conclusively established that the only possible manner in which the brakes on Second 21 could have been applied or set prior to the collision was by human intervention and the only person who had access to the brake setting mecha-

nisms was McDonald. It, therefore, follows from this proof that McDonald set the brakes on Second 21 after Block Signal 7639 was reached or passed.

Petitioner's complaint contained two counts, one based upon the failure of respondent to use ordinary care in the operation of its trains, the other charged gross negligence and wilful and wanton misconduct. Respondent pleaded as a defense to each of these counts the condition on the free pass. Petitioners moved to strike this defense as immaterial (R. 12). This motion was denied (R. 13). Petitioners requested the Court to instruct the jury that if respondent failed to exercise ordinary care in the operation of its trains petitioners were entitled to recover (R. 222). The Court refused to grant this request and petitioners duly excepted (R. 219, 220). Petitioners excepted to those portions of the Court's instructions which exonerated respondent from ordinary negligence (R. 220).

The Court, in submitting the issues to the jury, instructed in part as follows:

> "They were riding on a pass, a railroad pass issued by the defendant Southern Pacific Company. That pass recited and provided that the railroad company could not and would not be held liable for any negligence of its employes by which these plaintiffs might be injured.
>
> "Now, the Supreme Court of the United States has held that that waiver is valid and that when people sign such a waiver and ride on a pass containing it, they are not permitted to recover for just ordinary negligence.
>
> "So that this case has been submitted to you and will now be submitted to you upon the question of whether or not Mr. McDonald, the engineer on that second section that morning, was guilty as charged in the complaint in each case of wilful and wanton misconduct.

"Now I will read you a more lengthy and definite statement as to the definition of wilful and wanton misconduct but I will state now that it implies a mental state. Negligence—just ordinary negligence does not imply any mental purpose. It is just thoughtless carelessness. For instance, ordinary negligence is usually defined something like this: it is the failure to do what a reasonably prudent person would ordinarily have done under the circumstances of the situation, or doing what such person under such existing circumstances would not have done. So there is not any wilfullness or wantonness involved in ordinary negligence.

"This pass which these people were using on that occasion exonerated and released the defendant company from that sort of negligence. It did not release them from wilful misconduct or wanton actions" (R. 207, 208).

The facts of this case, when viewed in the light of the controlling principles of law as announced by the Supreme Court of Utah in the case of *Halling* v. *Industrial Commission of Utah*, 71 Utah 112, 263 P. 78, clearly reveal the extent to which petitioners' rights have been violated.

Specification of Errors

The United States Circuit Court of Appeals, Tenth Circuit, erred:

1. In holding that under the law of the State of Utah it is essential to the maintenance of a wrongful death action that the act or default of the respondent be of such character that decedent could have maintained an action to recover damages for his injuries if death had not ensued.

2. In refusing to follow and apply the law of the State of Utah as declared and established by its highest court in this action which arose under and was controlled by the laws of the State of Utah.

3. In holding that the Utah Wrongful Death Statute, upon which this action is based, creates a survival action when the Supreme Court of the State of Utah has held that it creates a new and independent action in favor of the heirs of the decedent, an action over which decedent had no control and was powerless to in any way limit, settle, destroy, or abrogate.

4. In holding that the Hepburn Act, 49 U. S. C. A., Section 1(7), controlled the nature and effect of petitioners' rights in this wrongful death action which arose under the laws of the State of Utah.

5. In holding that the nature and extent of petitioners' rights in this action were dependent upon the effect given the contract entered into between respondent and its employee in connection with the issuance of free passes under the Hepburn Act by the Circuit Court.

6. In holding that respondent was insulated against the legal consequences of its negligence in the operation of its trains by the contractual provisions limiting liability contained in the pass because:

(a) The contractual provisions of the free pass do not purport to relieve respondent of liability in the event the user of the pass is killed.

(b) Petitioners were not parties to the contract set forth in the pass and were not bound thereby.

(c) The effect of the Court's holding is to deprive petitioners of property without due process of law in violation of the Constitutions of the United States and the State of Utah.

7. By holding in effect that a contract entered into by and between respondent and petitioners' ancestors in connection with a free pass issued to said ancestors pursuant to the Hepburn Act to which petitioners were not parties could

be so employed as to justify the deprivation of petitioners' property without due process of law contrary to the provisions of the Constitutions of the United States and the State of Utah.

8. In denying petitioners the right of trial by a jury drawn from a cross-section of the community as guaranteed to them by the Constitution of the United States.

Argument

Point I

Petitioners' Rights Were Created by the Laws of Utah and the Laws of Utah Are, Therefore, Controlling.

The train collision causing the deaths of petitioners' parents having occurred in the State of Utah, the Law of Utah is controlling. *Gerling* v. *Baltimore & O. R. Co.*, 14 Sup. Ct. 533, 151 U. S. 673, 38 L. Ed. 311; *Northern Pacific Ry. Co.* v. *Meese*, 36 Sup. Ct. 223, 239 U. S. 614, 60 L. Ed. 467; *Old Dominion S. S. Co.* v. *Gilmore*, 28 Sup. Ct. 133, 207 U. S. 398, 52 L. Ed. 264; *Vancouver Steamship Co.* v. *Rice*, 288 U. S. 445, 77 L. Ed. 885, 53 Sup. Ct. 420; *Nichols* v. *Atchison, etc., R. Co.*, 286 Fed. 1, *affirmed* 44 Sup. Ct. 353, 264 U. S. 348, 68 L. Ed. 720; *Moss* v. *Pennsylvania R. Co.*, 146 F. (2d) 673, *Cert. den.* 65 Sup. Ct. 1200, 325 U. S. 861, 89 L. Ed. 1982; *Dawson* v. *McWilliams*, 146 F. (2d) 38; *Roth* v. *Swanson*, 145 F. (2d) 262; *Carter* v. *Kurn*, 127 F. (2d) 415; *Mann* v. *Minnesota Electric Light Co.*, 43 F. (2d) 36.

In *Betts* v. *Southern Ry.*, 71 F. (2d) 787, the Court stated:

> "• • • there is no question but that all matters pertaining to the substantive right of recovery under a wrongful death statute, including the right to recover, the nature of the right, and the party in whom it is vested, are governed by the law of the state where the injury resulting in death occurred" (71 F. (2d) 789).

The legal principle above stated is firmly established in our jurisprudence and we have been unable to find any authority which declares or supports a contrary view. While there has never been any express or admitted contention made against this principle of law in any of the proceedings herein, it has never been recognized or given any force or effect whatsoever in determining the issues of this case. The trial court and the Circuit Court wholly ignored the Utah Constitutional and Statutory Law and controlling State decisions in reaching the conclusions and determinations which have resulted in the defeat of petitioners' cause up to this point.

The trial court refused to consider or give effect to Utah law in determining petitioners' motion to strike the contractual conditions attached to and made a part of the free pass pleaded by respondent as its chief defense to this action (R. 13). The trial court, contrary to the law of Utah, refused to instruct the jury that if defendant failed to exercise ordinary care in the operation of its trains, petitioners were entitled to recover (R. 219, 220, 222), but instructed that as matter of law respondent was completely exonerated from ordinary negligence by reason of the conditions attached to the free pass. The jury was instructed, contrary to Utah Law, that respondent could not be held liable unless found guilty of wilful and wanton misconduct (R. 207, 208).

The Circuit Court of Appeals refused to consider or give effect to Utah law when it declared as follows (R. 275):

> "And it is essential to the maintenance of the action that the wrongful act or default be of such character that the decedent could have maintained an action to recover damages for his injury if death had not ensued. While it is not a derivative action in the ordinary meaning of the term, recovery cannot be had unless the decedent could have recovered damages for his wrongful injury if he had survived."

In marshalling support for this statement of law, which was absolutely determinative of the issues of this case in the Circuit Court of Appeals, that court entirely overlooked the decision of the Supreme Court of Utah in *Halling* v. *Industrial Commission*, 71 Utah 112, 263 Pac. 78, where a contrary result was reached and declared. Ignoring the *Halling* decision, the Court placed reliance on the authority of *Northern Pacific Railway Co.* v. *Adams*, 192 U. S. 440, 24 Sup. Ct. 408, wherein this Court gave controlling effect to the law of the State of Idaho in a wrongful death action which arose under the laws of that State. The law of Idaho on this material subject is contrary to and at variance with the law of the State of Utah. Compare *Helgeson* v. *Powell*, 54 Idaho 667, 34 Pac. (2d) 957, and *Halling* v. *Industrial Commission, supra.*

The Circuit Court of Appeals also supported its holding by a citation of the following decisions of this Court: *Michigan Central Railroad Co.* v. *Vreeland*, 227 U. S. 59, 33 Sup. Ct. 192; *Mellon* v. *Goodyear*, 277 U. S. 335, 48 Sup. Ct. 541; *Flynn* v. *New York, New Haven & Hartford Railroad Co.*, 283 U. S. 53, 51 Sup. Ct. 357. In these cases this Court declared, construed and applied the survival features of the Federal Employers' Liability Act in death actions arising under that Act and held that such actions are survival in character and not completely independent in nature as are wrongful death actions arising under Utah law.

The rulings of this Court in the *Mellon* case, *supra*, and *Flynn* case, *supra*, are based upon the following statement of law made by this Court in the *Vreeland* case, at page 196 of 33 Sup. Ct.:

> "But as the foundation of the right of action is the original wrongful injury to the decedent *it has been generally held that the new action is a right dependent*

upon the existence of a right in the decedent immediately before his death to have maintained an action for his wrongful injury." (Italics added.)

This is contrary to the law of Utah as announced by its highest court in the *Halling* case, *supra.* The law of Utah being controlling herein, Revised Statutes, Section 721, 28 U. S. C. A., Sec. 725, *Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, 114 A. L. R. 1487, it is apparent that the Circuit Court committed error in its holding as above set forth.

Point II

Under Utah Law the rights of heirs in a wrongful death action are completely independent of any rights or privileges which decedent may have had or could have exercised during his lifetime. It is, therefore, immaterial to the maintenance of such action in Utah whether the wrongful act or default be of such character that decedent could have maintained an action to recover damages for his injuries if death had not ensued.

The inquiry of primary importance is, what are the legal aspects of the cause of action for wrongful death created by the Constitution and Statutes of the State of Utah as construed and interpreted by the decisions of its highest court? The Constitution provides:

> "The right of action to recover damages for injuries resulting in death, shall never be abrogated, and the amount recoverable shall not be subject to any statutory limitation, except in cases where compensation for injuries resulting in death is provided for by law." Sec. 5, Art. 16, Constitution of Utah, as amended.

Prior to statehood the Statutes of the Territory of Utah provided as follows (Section 2961, Compiled Laws of Utah, 1888):

> "Whenever the death of a person shall be caused by wrongful act, neglect or default, *and the act, neglect or*

default is such as would, if the death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who, or the company or corporation which, would have been liable if death had not ensued, shall be liable to an action for damages notwithstanding the death of the person injured and although the death shall have been caused under such circumstances as amount in law to felony."

The italicized portion of Section 2961 was eliminated from the Utah Statutes by the State Legislature in 1898 in the first revision of State Laws after statehood. Since that time the State Wrongful Death Statute has remained essentially in its present form.

Section 104-3-11, Utah Code Annotated, 1943.[1]

It will be observed that the State Legislature in 1898 eliminated from Utah Law the identical restrictive condition employed by the Circuit Court of Appeals in 1947 to defeat petitioners herein. The Legislature of Utah eliminated the restrictive condition "and the act, neglect or default is such as would if the death had not ensued have entitled the party injured to maintain an action. * * *" The Circuit Court declared "It is essential to the maintenance of the action that the wrongful act or default be of such character that the decedent could have maintained

[1] "Except as provided in chapter 1, of Title 42, when the death of a person not a minor is caused by the wrongful act or neglect of another, his heirs, or his personal representatives for the benefit of his heirs, may maintain an action for damages against the person causing the death, or, if such person is employed by another person who is responsible for his conduct, then also against such other person. If such adult person has a guardian at the time of his death, only one action can be maintained for the injury to or death of such person, and such action may be brought by either the personal representatives of such adult deceased person, for the benefit of his heirs, or by such guardian for the benefit of the heirs as provided in the next preceding section. In every action under this and the next preceding section such damages may be given as under all the circumstances of the case may be just."

(Section 104-3-11, Utah Code Annotated, 1943.)

an action to recover damages for his injury if death had not ensued. * * * Recovery cannot be had unless the decedent could have recovered damages for his wrongful injury if he had survived."

The historical background of the Utah Law is most significant in any proper appraisement or construction of the Wrongful Death Law of the State. Utah's original Wrongful Death Statute, viz: Section 2961, Compiled Laws of Utah, 1888, was enacted by the Twenty-first Territorial Legislature in February, 1874. It became Section 1216, Compiled Laws of Utah, 1876 and remained as the law of the Territory until statehood, and, as State law until eliminated by the Legislature in 1898.

The Constitution of the State of Utah was adopted November 5, 1895. The Proclamation of the President of the United States admitting the State to the Union was issued January 4, 1896, upon which date the State Constitution became the paramount State law.

It is apparent that the provision in the Constitution guaranteeing the right of action to recover damages for injuries, resulting in death against abrogation was in conflict with the pre-existing territorial statute which provided that such actions could only be maintained where the wrongful act or default was of such character that the decedent could have maintained an action to recover damages for his injury if death had not ensued.

The State Legislature no doubt recognized this conflict and revised the statute in such way as to bring it into harmony with the constitutional provision. It is reasonable to assume that the Legislature recognized the necessity of clarifying the law by enacting statutory provisions which would give full force and effect to the letter and spirit of the constitutional provisions freeing and liberating the right of action for wrongful death from any danger of abrogation from any source whatsoever.

It seems apparent that the complete abridgement of the power to abrogate is in conflict with the existence of such power wherever it may reside. The declaration in the Constitution is plain, simple and unambiguous. There is no limitation of the guarantee therein contained to be found in the laws of Utah nor in the decisions of its Supreme Court.

"The right of action to recover damages for injuries resulting in death shall never be abrogated" declares the Constitution of the State of Utah. It shall never be abrogated by the Legislature of the State, neither shall it be abrogated by any contract, agreement, settlement, release or by any other conduct of decedent during his lifetime either before or after suffering the injuries causing death. There is no justification for an assumption that the constitutional guarantee against the abrogation of this right extends only to the State Legislature. It is submitted that the extent of the guarantee is such as to free the right of action from the power of interference, limitation, settlement, compromise, release or abrogation by decedent during his lifetime acting on his own behalf or contractually with others.

In this case the Circuit Court of Appeals abrogated the right of action for wrongful death contrary to the Constitution of the State of Utah. It abrogated this right by decreeing a restrictive conditional limitation contrary to the expressed will of the Legislature of the State of Utah. Not only has the Circuit Court of Appeals refused to follow or consider Utah law but it has re-enacted restrictive and abrogating conditions stricken from the law of Utah by its Legislature.

Prior to statehood the Supreme Court of the Territory of Utah construed and applied the Wrongful Death Statutes as they then existed in the case of *Mason* v. *Union Pacific Railroad Company,* 7 Utah 77, 24 Pac. 796 (1890).

The territorial statutes contained the restrictive condition stricken out by the State Legislature in the revision of 1898. Mason was injured in a railroad accident, brought suit to recover for his injuries but died prior to trial. His personal representative having been substituted as party plaintiff sought to continue the action. The motion of the railroad company to dismiss was granted. The Court determined that the action created by statute for the benefit of the heirs was independent of any right which Mason may have possessed during his lifetime to recover compensation for his injuries. The Court held that defendant's wrongful act constituted the cause of action in favor of Mason while living, but that the statutory wrongful death action was based upon two facts, namely, the wrongful act and the death.[2]

The Court commented on the restrictive condition contained in the statutes at that time which was eliminated by the State Legislature in the revision of 1898.[3]

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[2] "The wrongful act caused the death of Mason but his death in turn must be regarded in a legal sense as causing the injury to the heirs." (7 Utah, 82.)

"* * * While the wrongful act of the defendant for the injuries which George S. Mason sued, invaded his rights, and the law gave him a right of action to redress the consequences of that invasion to him, that act did not in a legal sense invade the rights of his heirs, and therefore they had no wrong, from that act simply, to redress by an action. Their legal rights were not invaded until death ensued, and then the statute gave them instantly a right of action to redress the losses following that invasion of their rights. The wife or children do not succeed to the husband's or father's cause of action; that dies with him. But, immediately upon his death, a new cause of action arises in their favor. The statute then gives them a new cause of action. It does not revive or continue the husband's or father's cause of action." (*Mason* v. *U. P. Ry. Co.*, 7 Utah, 81.)

[3] "These sections give to the personal representatives or heirs a right of action against the person whose wrongful act or neglect causes the death of another, when the deceased, if he were living, could maintain one. If the person sustaining the direct injury from the wrongful act or neglect had a right of action for it, his heirs have one for their injury for his death caused by the same act or neglect." (*Mason* v. *U. P. Ry. Co.*, 7 Utah 77, 80.)

The Circuit Court of Appeals properly cited and relied upon the Utah cases of *Mason* v. *Union Pacific R. Co., supra; Halling* v. *Industrial Commission, supra;* and *Morrison* v. *Perry, supra,* to support the proposition that the Utah statute does not provide for the survival of a right of action, nor transfers a right of action from the decedent to his heirs, but creates a new and independent right of action in the heirs which did not exist at common law, an action separate and distinct from any which the decedent might have maintained for personal injuries had he survived. The court, however, erred in declaring as the controlling principle of law:

> "* * * *and it is* essential to the maintenance of the action that the wrongful act or default be of such character that the decedent could have maintained an action to recover damages for his injury if death had not ensued." (R. 300)

To support this proposition it became necessary for the court to ignore the Utah case wherein the identical question was decided and a contrary result reached. The court rested its holding on the authority of four cases from this Court: *Northern Pacific Railway Co.* v. *Adams,* 192, U. S. 440, 24 S. Ct. 408; *Michigan Central Railroad Co.* v. *Vreeland,* 227 U. S. 59, 33 S. Ct. 192; *Mellon* v. *Goodyear,* 277 U. S. 335, 48 S. Ct. 541; and *Flynn* v. *New York, New Haven & Hartford Railroad Co.,* 283 U. S. 53, 51 St. Ct. 357.

In neither of these cases did this Court purport to construe, interpret or apply the laws or statutes of any state or jurisdiction where the law, by enactment, construction or otherwise, is similar to the law in Utah on the question, Is it essential to the maintenance of a wrongful death action that the wrongful act or default be of such character that the decedent could have maintained an action to recover damages for his injury if death had not ensued?

In the case of *Northern Pacific Railway Co.* v. *Adams*, supra, this Court construed and applied the Idaho statute as being a survival statute and that construction was later adopted by the Idaho Supreme Court in *Helgeson* v. *Powell*, 54 Idaho 667, 34 Pac. 2d 957. That the Idaho law on this vital point is contrary to the law in Utah is clearly revealed by a comparison of the decisions in *Helgeson* v. *Powell* (Idaho), supra, and *Halling* v. *Industrial Commission* (Utah), supra. In *Michigan Central Railroad Co.* v. *Vreeland*, supra; *Mellon* v. *Goodyear*, supra, and *Flynn* v. *New York, New Haven & Hartford Railroad Co.*, supra, this court construed and applied the Federal Employers' Liability Act.

It is granted that under the law of Idaho as construed in the *Adams* case, and under the Federal Employers' Liability Act, as declared in the *Vreeland*, *Mellon* and *Flynn* cases, supra, the wrongful act or default must be such that the decedent could have maintained an action to recover damages for his injuries if death had not ensued. This, however, is contrary to the law in the State of Utah as provided in its Constitution, Section 5, Article XVI, and by its Statutes, Section 104-3-11, Utah Codes Annotated, 1943, and as announced by its highest court in *Halling* v. *Industrial Commission*, supra. Inasmuch as this vital difference in the legal aspects of the law was not recognized by the Circuit Court of Appeals, error was committed in affirming the judgment of the trial court. By affirming the judgment of the trial court the Circuit Court of Appeals nullified and held for naught important and valuable rights created by and under the laws and statutes of the State of Utah.

The delect which forms the basis of petitioners' action and the wrongful death took place and occurred in the State of Utah, and the Supreme Court of Utah in the *Halling* case, supra, having construed, applied and declared the law here

controlling, neither the Federal Employers' Liability Act nor the laws of the State of Idaho with respect to such action is material. *Erie Railroad Co.* v. *Tompkins*, supra.

Neither the Utah constitutional or statutory provisions nor the controlling decisions of its Supreme Court were considered or discussed in determining the crucial issue of this case. On September 9, 1925, Halling filed written application with the State Industrial Commission for compensation for injuries alleged to have occurred during the course of his employment on June 10, and August 8, 1925. Hearing was had on the application October 7, 1925 and the Commission found:

> "The applicant, on the 8th day of August, 1925, was not injured by reason of an accident arising out of or in the course of his employment while regularly employed by Henning Henderson." (71 Utah, 115)

In due time petition for rehearing was filed, and on March 9, 1926, it was heard, determined and denied by the Commission. No appeal was taken and the decision became final. On December 7, 1926 Halling died. On February 11, 1927 his wife, on behalf of herself and five minor children, filed an application with the Industrial Commission for compensation for the death of her husband, claiming that he died as a result of the injuries suffered by him in June and in August of 1925. Upon the hearing the Commission held and found:

> " * * * his wife and minor children, who claim, through him, could be in no better position before the commission than the deceased himself, and that therefore we are without jurisdiction to entertain this application, and that for this reason the case should be dismissed." (71 Utah, 117)

This holding of the commission is directly in line with the Circuit Court's declaration of law which furnished the foundation for the judgment of affirmance.

The Supreme Court of Utah stated as the controlling issue:

> "The sole question before us for review in this proceeding is whether or not the commission properly dismissed the application of Rose J. Halling and her minor children for the reasons stated by the commission in its decision." (71 Utah, 117)

In making its determination that the commission acted improperly, the Utah court placed the matter squarely upon the rights of Mrs. Halling and her children under the constitutional and statutory provisions hereinabove set forth.[4]

The defendant argued that inasmuch as an award under the Workmen's Compensation or Industrial Act is not made on the theory that a tort has been committed, but on the theory that the statute giving the award is read into and becomes a part of the contract of employment, the law pertaining to wrongful death actions as provided by the Consti-

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[4] "To determine this question it is necessary to briefly review the history of the laws of this state with respect to the rights of a surviving widow and minor children in a claim growing out of an injury resulting in the death of the husband and father." (*Halling* v. *Ind. Comm. of Utah*, 71 Utah, at page 117.)

"* * * Under the provisions of Article 16, Sec. 5 of the Constitution of Utah, both before and after the amendment, the right to recover damages for injury resulting in death can never be abrogated. The addition of the words, 'except in cases where compensation for injuries resulting in death is provided for by law,' gave to the Legislature the power to fix the amount of compensation, but not the power to entirely abrogate compensation. Any other construction would be contrary to the well-recognized rule of construction that when possible, effect should be given to all of the language used in a statutory or constitutional provision. It therefore is beyond the power of the Legislature to take from the dependents of an employee their claim against the employer, where such employee dies as the result of a wrongful injury by the employer. Under the provisions of article 16, sec. 5 of our Constitution, prior to the amendment, the Legislature could neither abrogate nor limit the amount of recovery in such case, and, after the amendment, the Legislature may provide for compensation, but may not take from the dependents their rights to some compensation."
(*Halling* v. *Ind. Comm. of Utah*, 71 Utah, at pp. 120-121.)

tution and statutes of the State of Utah was not applicable. The Court held to the contrary.[5]

The fact that Halling during his lifetime was denied compensation by the Commission was held to be immaterial and in no way binding upon his heirs. If the final denial of Halling's petition for compensation in no way embarrassed, abrogated, encumbered, modified or limited the right of his heirs to recover for his death, it is difficult to perceive how the contract entered into between Jack Francis and respondent prior to his injury and death could defeat, destroy and abrogate his children's cause of action for his wrongful death, the heirs of each founding their claims upon identical law.

The authorities relied upon by the Utah Supreme Court in the *Halling* case, supra, likewise support petitioner's contention.

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5 "• • • In either case the employee or his dependents are without any remedy, except to accept the compensation provided by law. *As we have indicated, the right of an employee's dependents to recover for wrongful injury resulting in the death of such employee is not the result of any contract. It is a constitutional right which cannot be denied dependents without their consent, except by a court or other judicial tribunal of competent jurisdiction after notice given and a hearing had. To hold otherwise would be depriving the applicant of property without due process of law.*

'A vested right of action is property in the same sense in which tangible things are property, and, is equally protected against arbitrary interference.' 2 Cooley's Constitutional Limitations (8th Ed.), p. 756, and cases cited in the footnote.

"If the dependents of Mariner Halling have a right to be heard on their claim for compensation in case his injury and resulting death was caused by the negligence of his employer then it follows that such dependents likewise have such right to be heard on their claim for injury resulting in his death, in the absence of any negligence of his employer so long as such injury and resulting death arose out of or was received in the course of the employment of the deceased. The Workmen's Compensation or Industrial act makes no distinction between a claim based upon negligence of the employer and a claim not founded on any negligence of the employer. *Prior to the enactment of Laws Utah 1921, c. 67, by both judicial construction and constitutional provision, the rights of the employee's dependents in case death resulted from wrongful injury were separate and distinct from the rights of the employee for such injury. The law has not been*

In *Earley* v. *Pacific Electric Ry. Co.*, 176 Cal. 79, 167 Pac. 513,[6] cited by the Utah Court in the *Halling* case, at page 118 of 71 Utah, the Supreme Court of California held that a release, given by an injured person to the wrongdoer subsequent to the injury but prior to death was no defense to an action for wrongful death brought under the statute of California which is identical with the Utah statute. This decision, of course, is contrary to the decision of this Court in *Mellow* v. *Goodyear*, supra, based on the Federal Employers' Liability Act.

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changed where the employer wilfully injures the employee, nor in case the relation of employer and employee does not exist. We find nothing in the language of the Workmen's Compensation or Industrial Law in its present form indicating any legislative intent to change the nature of the rights of the dependents who claim compensation under the provisions of such law rather than under the law as it existed before we had a Workmen's Compensation or Industrial Act. In the main, the reasons advanced in support of the conclusions reached in the case of *Mason v. Union Pacific Railroad Co.*, supra, are applicable here. *We are therefore of the opinion that the wife and minor children of Mariner Halling did not, and could not, derive any claim for compensation through the deceased, but their claim is separate and independent of any claim deceased may have had during his lifetime.* • • • (71 Utah, 121-123.)

"In the case of *Biederzycki v. Farrel Foundry & Machine Co., supra, the defendant had been given one opportunity to be heard, but the applicants in this case were in no sense given any opportunity to be heard in the proceedings had upon the application of Mariner Halling. The applicants in the instant case were entire strangers, in a legal sense, to the proceedings had upon the application of Mariner Halling. They may or may not have known of the former proceedings. It is clear that they had no right to control the former proceedings, nor to produce or cross-examine witnesses, nor to appeal from the judgment rendered, nor to prevent Mariner Halling from filing or refusing to file his application for compensation.*" (71 Utah, 124.)

(*Halling* v. *Ind. Comm. of Utah*, 71 Utah 112, at pp. 121-123, 124.)

[6] The following is quoted from the decision:

"Section 377 of the Code of Civil Procedure, under which this action was brought, provides that:

> 'When the death of a person not being a minor is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death, or if such person be employed by another person who is responsible for his conduct, then also against such other person. In

In *Tann* v. *Western Pacific Ry. Co.*, 39 Cal. App. 377, 178 Pac. 971 (cited by the Supreme Court of the State of Utah in the *Halling* case at page 118 of 71 Utah), it was held that the statute of limitations pertaining to bringing of personal injury actions was not controlling in an action for wrongful death, but that the running of the statute of limitations in the latter action commenced with the death and not with the injury. This decision is contrary to that of this Court in *Flynn* v. *New York, New Haven & Hartford Railroad Co.*, supra, relied upon by the Circuit Court of Appeals; where limitations of actions provisions in the Federal Employers' Liability Act were construed, declared and applied.

In *Blackwell* v. *American Film Co.*, 189 Cal. 689, 209 P.

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every action under this and the preceding section, such damages may be given as under all the circumstances of the case may be just.'

"The attorney for the appellant, and amici curiae adopting the same construction of the law as does appellant's attorney, have presented for the consideration of this court elaborate briefs discussing the origin of the right of action for wrongful death under Lord Campbell's Act, the varying statutes of the states of the United States passed after, and some in copy of the English act, and from a learned and elaborate analysis reached the conclusion that the wrong which the defendant committed—the tort upon the person of the deceased—was necessarily but a single wrong, and that, as the defendant had received its full acquittance and discharge from all consequences arising from that wrong from the injured man himself, the wrong itself was compensated for, and in point of law was extinguished, so that it could not be made the basis of any further action by any person whatsoever.

"It would not be without interest, but at the same time it is wholly unnecessary to follow these learned counsel in their analyses of the varying statutes and the decisions of the courts upon them. For when the last word shall have been said in such a consideration, the paramount fact will still remain that rights under our section 377 of the Code of Civil Procedure are to be defined not by what other courts have said touching their own statutes, but from the meaning and intent of our own law derived from a reading of it. Upon this matter we are not without light from previous decisions. Thus in *Munro* v. *Dredging Co.*, 84 Cal. 515, 24 Pac. 303, 18 Am. St. Rep. 248, referring to this section, it is said:

'It may be observed that the language of the statute of this state (section 377 C. C. P.) is broader than the language of the English statute.'

999, (cited by the Supreme Court of Utah in the *Halling* case at page 118 of 71 Utah), the court held that the satisfaction of a judgment obtained by decedent in an action instituted to recover damages for personal injury did not prevent a recovery by his wife for her husband's wrongful death caused by the same wrong inasmuch as she was suing, not to recover damages for the injuries and consequent sufferings and loss to decedent, but to recover as an heir or personal representative the damages she had sustained by reason of decedent's death. This holding is contrary to the holding of this Court in *Mellon* v. *Goodyear*, 277 U. S. 335, 48 S. Ct. 541, construing the Federal Employers' Lia-

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"In the case of *Burk* v. *Arcata & Mad River R. R. Co.*, 125 Cal. 363, 57 Pac. 1065, 73 Am. St. Rep. 52, it is said:

> 'The statutes in the different states, though varying greatly, follow generally Lord Campbell's Act, 9 and 10 Victoria, c. 95. In that it was recited that no right of action existed at common law for such damages. It was then a new right of action. It could not be a continuance of the right which the injured man had for the injury; for the loss to his heirs did not accrue until he died. Under our statute the injured person might survive long enough to sue and recover damages, or to settle with the wrongdoer, and then, by his death, a new cause of action would accrue to his heirs. True, it has been held differently in some states, which have what are called 'survival statutes.' Here it has been ruled, as the fact evidently is, that the statute creates an entirely new cause of action.'

"Some statutes are but statutes of survivorship. They carry over to some living person after the death of the injured person precisely the right of action and precisely the right of recovery which the injured person would have had if his injuries had not resulted fatally. Manifestly under such a statute a composition agreement and release of the wrongdoer deprives the living person, who may have been empowered by the statute to commence or carry on the action, of all right of recovery. But such is not our statute. Our statute creates a new right of action with a different measure of damage from that which accrued to the injured person as a result of the defendant's wrongdoing. The right of action is to the heirs or representatives of the deceased and the elements of damage (without here attempting to specify them all) include in the case of the widow an admeasurement of the financial loss occasioned to her by the death of her husband through the deprivation of his society, comfort, and protection. Upon the other hand, the right to recover for physical suffering—a right which is always an element of damage when the action is prosecuted by the

bility Act and relied on by the Circuit Court of Appeals in this case.

The holding of the Circuit Court of Appeals is likewise contrary to and in conflict with the decisions in the following cases where wrongful death statutes have been given a construction and application similar to that given to the Utah Statutes and constitutional provisions in the *Halling* case: *Rowe* v. *Richards*, 35 S. D. 201, 151 N. W. 1001, L. R. A. 1915E, 1075, Ann. Cas. 1918A, 294; *Phillips* v. *Community Traction Co.*, 46 Ohio App. 483, 189 N. E. 444; *Routh* v. *List & Wetherly Const. Co.*, 124 Kan. 222, 257 P. 721, 62 A. L. R. 150; *In re Cripp*, 216 Mass. 586, 104 N. E. 565; *American Steel Foundries* v. *Industrial Commission*, 361 Ill. 582, 198 N. E. 687; *Stokes* v. *Collum Commerce Co.*, 120 Okla. 133, 252 P. 390. Admissions made by the deceased person during his life are inadmissible in an action for his wrongful death. *Marks* v. *Reissinger*, 35 Cal. App. 44, 169 P. 243. A judgment for injuries sustained is not a defense to an action for wrongful death: *Robinette* v. *May Coal*

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wronged and injured person—is not from its nature an element of the damage which the heir or personal representative may recover under the action given by our statute.

"One simple illustration, we think, will make the matter quite plain. A servant suffers wrongful and debilitating injuries at the hands of a third person. That third person is, of course, liable to the injured servant. The injured servant, however, compromises with a wrongdoer for the injuries which he has received and gives him a full release and acquittance. At the same time and by reason of the same single tort the master has his right of action against the wrongdoer for the loss of his employe's services. This was the right of action recognized at common law and is recognized by the statute law of this state. Civ. Code, Sec. 49. Would any one contend that the release of the wrongdoer by the servant operates also as a release and discharge of the wrongdoer from his liability under the independent right of action given by the law to the master? That right of action is wholly independent, precisely as is the right of action created in favor of the heirs, and it is no less independent because it has its origin in the same tort. The judgment and order appealed from are therefore affirmed."

(*Early* v. *Pacific Electric Ry. Co.*, 176 Cal. 79, 167 Pac. 513.)

Co., 31 Ohio App. 113, 166 N. E. 818; *Dayhuff* v. *Brown & Allen*, 150 Ga. 290, 103 S. E. 458; *Chicago, R. I. & P. Ry Co.* v. *Martin*, 59 Kan. 437, 53 P. 461; *Pittsburgh, C. C. & St. L. R. Co.* v. *Hosea*, 152 Ind. 412, 53 N. E. 419; *Tingley* v. *Long Island R. Co.*, 96 N. Y. S. 865.

It is apparent from the authorities hereinabove cited that the rights of action created by the various death statutes differ widely. The action may be a survival action only. It may be a new and independent action. It may be one dependent upon the rights of the decedent immediately prior to death or it may be an action of such nature that decedent was powerless while living to control, settle, compromise, liquidate, satisfy, discharge or abrogate by any means at his command whatsoever.

Prior to the decision of the Circuit Court of Appeals in this case, the action created by the Constitution and Statutes of Utah was of the latter type. As a result of that decision, there has been an amendment to the Utah law by judicial implication.

In *Helgeson* v. *Powell*, 54 Idaho 667, 34 Pac. 2d 957, the Idaho Supreme Court was forced to recognize the amendment of its statute by judicial implication:

> "Thus it will be seen that by the construction this court has placed on said statute, it has the same force and effect by implication as if it expressly contained the provision 'whenever the wrongful act would have entitled the person injured to maintain an action if death had not ensued.' " (See 34 Pac. 2d at page 961).

The Court's attention has been heretofore called to the fact that this so-called amendment "by judicial implication" was stricken from the Utah Law by the positive and definite act of its State Legislature. It is submitted that the decision of the Circuit Court is contrary to and in conflict with local applicable law, and therefore should be reversed.

Point III

Neither the Hepburn Act, 49 U. S. C. A., Section 1(7), nor the contractual condition, attached to the free pass issued to petitioners' father pursuant to said Act, are material here.

Relying upon the Hepburn Act and the contractual conditions attached to the free pass, the trial court instructed the jury that as a matter of law respondent was exonerated from ordinary negligence:

> "* * * they were riding on a pass, a railroad pass issued by the defendant, Southern Pacific Company. That pass recited and provided that the railroad company could not and would not be held liable for any negligence of its employees *by which these plaintiffs might be injured.*
>
> "Now, the Supreme Court of the United States has held that the waiver is valid and that when people sign such a waiver and ride on a pass containing it, they are not permitted to recover for just ordinary negligence." (R. 207)

The Circuit Court of Appeals in reliance upon the Hepburn Act and contractual conditions affirmed the trial court.[7]

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[7] In Opinion of Circuit Court of Appeals (R. 275, 276):

"At the time of the fatal accident, the father of the plaintiffs was using the pass issued to him in transportation in interstate commerce. The pass had been issued under the provisions of the Hepburn Act, as amended, 49 U. S. C. A. Sec. 1. The force and effect of a condition attached to such a pass absolving the company from liability for injuries to person or property is not governed by the law of the state in which personal injury or death occurred. It is governed by federal law. Northern Pacific Railway Co. v. Adams, supra; Kansas City Southern Railway Co. v. Van Zant, 260 U. S. 459. And where the holder of a pass containing a provision of that kind uses it for transportation in interstate commerce as a passenger on the train of the company issuing the pass and is killed while en route as the result of an accident, the company is not liable to the surviving heirs of the deceased under a state statute such as section 104-3-11, supra, for

Neither the Hepburn Act, the contractual provisions attached to the free pass, nor the cited cases are material or determinative of the issues raised in this case.

In *Kansas City Southern Railway Co.* v. *Van Zant*, 260 U. S. 459, 43 S. Ct. 176, this Court held that Congress by the enactment of the Hepburn Act assumed control over the entire field of free passes issued by railroad companies. That case recognizes the right of railroad companies in dealing with their employees pursuant to the Act to attach contractual conditions to the passes and holds that as between the parties to the pass those contracts are valid. It is earnestly contended, however, that Congress, by the enactment of the Hepburn Act, did not intend to assume control over every field of law that might be involved, indirectly, collaterally or otherwise, in the issuance or use of free passes. It cannot be presumed from the enactment that Congress thereby intended to assume control over wrongful death actions generally nor to limit the unquestioned power of states to determine the nature, extent and characteristics of wrongful death actions arising within their borders. No such limitation or control of wrongful death actions is necessary, useful or required in order to give full force and effect to the Hepburn Act or any part or portion thereof, or to afford Congress full power to control the issuance and use of free passes. Certainly the purpose of Congress to prohibit the free transportation of passengers with certain exceptions by interstate carriers as declared in the Hepburn Act should not be extended by unnecessary implication to the point of regulating, controlling, limiting and abrogating rights arising under state

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damages approximately caused by ordinary negligence in the operation of the train. Northern Pacific Railway *v.* Adams, supra. Therefore the court was correct in declining to submit to the jury the issue of ordinary negligence in the operation of the second section of the train, as charged in the first count of the complaint."

wrongful death statutes or to the point of extinguishing rights of strangers to the permitted free pass and contractual conditions attached thereto. We submit that the recognition and enforcement of the rights claimed by petitioners here cannot be deemed an infringement on the admitted power of Congress to control and regulate interstate commerce, nor to control the issuance and use of passes. Without question, the validity of free passes and contracts limiting liability of carriers entered into in consideration of the issuance of such passes are questions of Federal law under the *Van Zant* case. Petitioners have never questioned the validity of the free pass or the contract entered into between respondent and Jack Francis in consideration of its issuance but have insisted that the pass and contract are immaterial here. In the *Adams* case this Court held that a contract limiting the liability of the railroad company to the holder of the pass was valid, not as a matter of Idaho or Federal law, but as a matter of general law. In the *Van Zant* case the court concluded from the holding in the *Adams* case that under Federal law contracts limiting liability entered into between the carrier and the passenger in consideration of the issuance of the pass are not void as against public policy. It seems obvious, however, that the admitted validity of the pass contract cannot affect or determine the rights of petitioners in their action to recover damages suffered by them as result of their parents' wrongful deaths. The past contract was between decedent and respondent. Petitioners were not parties to it and should not be required to suffer the loss of their birthright because of it. The contract does not purport to cover or limit the rights of petitioners, the children of the decedents, if it did it would be void as to them.

If, in law, petitioners' right of action was dependent upon the existence of an enforcible right in decedent at the time of his death, then the pass contract would defeat them, not

because of their being bound by the contract, but for the reason that their rights being dependent upon the enforcibility of their parents' right prior to death, would be likewise unenforcible. It is clear, however, as heretofore indicated that under Utah law petitioners' rights are wholly independent of the rights of their father at and prior to death. Inasmuch as their cause of action is not dependent upon the enforcibility of a right of action in decedent prior to death, the contract is immaterial here, as is the Hepburn Act under which it finds sanction.

In the paragraph of the opinion which contains the Circuit Court's discussion of the Hepburn Act (R. 275, 276), appears the statement that where the holder of a pass, containing a provision limiting liability, uses it for transportation on a train in interstate commerce and is killed while en route, the company is not liable to the surviving heirs of the deceased under a State statute, such as the Utah Statute. The *Adams* case is cited as authority. In the first place, the Circuit Court of Appeals was not called upon to construe and apply a statute similar to the Idaho Statute discussed in the *Adams* case. In that case the Idaho Statute was given an interpretation, construction and application contrary to that given the Utah Statute by the State's highest court. The Idaho Statute, as matter of law and fact, is therefore contrary to the Utah Statute, and this alone should have required a reversal.

The only reason why this Court held the pass waiver to be a defense to the action of the heirs of the decedent in the *Adams* case was the companion holding that by reason of the pass waiver the decedent had no enforcible cause of action against the railroad company at the time of his death and under Idaho Law the existence of an enforcible right of action in decedent immediately prior to death was a necessary condition to the enforcement of the heirs' right of action. This Court did not hold that the heirs were

parties to the contract or were bound by its provisions. We submit that none of the authorities cited by the Circuit Court of Appeals are applicable to the case at bar.

It seems apparent that the only possible effect which the Hepburn Act could have in a determination of rights arising or claimed under State Wrongful Death laws would be indirect and collateral in nature and effective only through the medium of contracts annexed to and made a part of free passes issued pursuant to said Act. The Hepburn Act does not purport to regulate contracts entered into by railroad companies and their employees in connection with the issuing of passes, its stated purpose is to limit and control the issuance of free passes by interstate carriers.

The principle to be used in testing the effect of any activity upon interstate commerce and determining whether or not it is direct or indirect has been repeated by this Court many times, but in no decision is it more clearly nor more succinctly stated than in *A. L. A. Schechter Poultry Corporation et al.* v. *United States*, 295 U. S. 495, at page 544, 548, 55 S. Ct. 837, 849, 79 L. Ed. 1570, 97 A. L. R. 947.[8]

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[8] "In determining how far the federal government may go in controlling intrastate transactions upon the ground that they 'affect' interstate commerce, there is a necessary and well-established distinction between direct and indirect effects. The precise line can be drawn only as individual cases arise, but the distinction is clear in principle. Direct effects are illustrated by the railroad cases we have cited, as e. g., the effect of failure to use prescribed safety appliances on railroads which are the highways of both interstate and intrastate commerce, injury to an employee engaged in interstate transportation by the negligence of an employee engaged in an intrastate movement, the fixing of rates for intrastate transportation which unjustly discriminate against interstate commerce. But where the effect of intrastate transactions upon interstate commerce is merely indirect, such transactions remain within the domain of state power. If the commerce clause were construed to reach all enterprises and transactions which could be said to have an indirect effect upon interstate commerce, the federal authority would embrace practically all the activities of the people,

Point IV

Neither the Hepburn Act nor the contractual conditions attached to the free pass relieve respondent of its duty to exercise ordinary care in the transportation of petitioners' parents.

The provisions of the contract of carriage created by this free pass are contrary to public policy if construed in such manner as to relieve respondent from the duty to exercise ordinary care in the transportation of the user of said pass. It is rather difficult to determine from the decision of the Circuit Court whether or not it was decided that in view of the pass contract respondent railroad company owed no duty to Mr. and Mrs. Francis except to refrain from injuring them fatally or otherwise by any wanton, wilful or intentional misconduct. It is submitted that a holding to the effect that by the contract the railroad

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and the authority of the state over its domestic concerns would exist only by sufferance of the federal government. Indeed, on such a theory, even the development of the state's commercial facilities would be subject to federal control. As we said in the Minnesota Rate Cases, 230 U. S. 352, 410, 33 S. Ct. 729, 745, 57 L. Ed. 1511, 48 L.R.A. (N.S.) 1151, Ann. Cas. 1916A, 18: 'In the intimacy of commercial relations, much that is done in the superintendence of local matters may have an indirect bearing upon interstate commerce. The development of local resources and the extension of local facilities may have a very important effect upon communities less favored, and to an appreciable degree alter the course of trade. The freedom of local trade may stimulate interstate commerce, while restrictive measures within the police power of the state, enacted exclusively with respect to internal business, as distinguished from interstate traffic, may in their reflex or indirect influence diminish the latter and reduce the volume of articles transported into or out of the state.' See, also, Kidd v. Pearson, 128 U. S. 1, 21, 9 S. Ct. 6, 32 L. Ed. 346; Heisler v. Thomas Colliery Co., 260 U. S. 245, 259, 260, 43 S. Ct. 83, 67 L. Ed. 237.

"The distinction between direct and indirect effects has been clearly recognized in the application of the Anti-Trust Act. Where a combination or conspiracy is formed, with the intent to restrain interstate commerce or to monopolize any part of it, the violation of the statute is clear. Coronado Coal Company v. United Mine Workers, 268 U. S. 295, 310, 45 S. Ct. 551, 69 L. Ed. 963. But, where that intent is absent, and the objectives are limited to intrastate activities, the fact that there may be an

company became possessed of an irrevocable license to injure or kill the decedents by any act or conduct short of wilful, wanton and intentional misconduct would constitute the approval of a doctrine as wicked and uncivilized as ever existed in the laws of any country.

The Utah laws provide a cause of action to the heirs of any person suffering death as a result of the wrongful act or neglect of another. Whether any particular conduct, act or omission constitutes "wrongful act or neglect" within the meaning of the statute depends upon the principles of general law and is not a matter to be resolved by the terms of a particular contract. Even granting for the purpose of argument that the quality of respondent's conduct as being negligent, wrongful or otherwise might properly be determined as between respondent and Mr. and Mrs. Francis on the basis of the contract, any such determination should not be binding upon petitioners and thus destructive of their rights inasmuch as they were not parties to the agreement in any manner or sense whatsoever. It would lead to legal complications, confusion and the complete

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indirect effect upon interstate commerce does not subject the parties to the federal statute, not withstanding its broad provisions. This principle has frequently been applied in litigation growing out of labor disputes. United Mine Workers v. Coronado Coal Company, 259 U. S. 344, 410, 411, 42 S. Ct. 570, 66 L. Ed. 975, 27 A. L. R. 762; United Leather Workers' International Union v. Herkert, 265 U. S. 457, 464-467, 44 S. Ct. 623, 68 L. Ed. 1104, 33 A. L. R. 566; Industrial Association v. United States, 268 U. S. 64, 82, 45 S. Ct. 403, 69 L. Ed. 849; Levering & Garrigues v. Morrin, 289 U. S. 103, 107, 108, 53 S. Ct. 549, 551, 77 L. Ed. 1062. • • •

"While these decisions related to the application of the federal statute, and not to its constitutional validity, the distinction between direct and indirect effects of intrastate transactions upon interstate commerce must be recognized as a fundamental one, essential to the maintenance of our constitutional system. Otherwise, as we have said, there would be virtually no limit to the federal power, and for all practical purposes we should have a completely centralized government."

A.L.A. Schechter Poultry Corporation et al. v. *United States*, 295 U. S. 495, at page 544, 548, 55 S. Ct. 837, 849, 79 L. Ed. 1570, 97 A. L. R. 947.

defeat of justice to hold that the nature, quality and legal characteristics of respondent's conduct be identified, determined and appraised by the raw terms of the contract regardless of well-recognized legal standards of conduct. It is submitted that from a purely rational point of view the railroad company owed the same duty of care to every person on the train whether traveling as a paying passenger, a free pass passenger, or with the mere consent and knowledge of the company. It might be that as between the railroad company and a free pass passenger the company, by reason of the contract, would have an adequate defense to any action for damages growing out of the negligent operation of the train. This defense would not be grounded upon the theory of nonexistence of duty, but on the ground that the company by the contract had insulated itself against liability for failure to discharge its duty of reasonable care. The railroad company owed Mr. and Mrs. Francis the duty of exercising ordinary care for their safety by reason of the fact that it accepted the responsibility of carrying them as passengers and by reason of the further fact that Mr. and Mrs. Francis were human beings. To hold otherwise would rob the law of any element or quality of ordinary justice based on the great humanitarian principle underlying all of the law of negligence.

In the case of *Southern Pac. Co.* v. *Schuyler*, 33 S. Ct. 277, 227 U. S. 601, 57 L. Ed. 662, 43 L. R. A. (N. S.) 901, affirming 37 Utah 581, 109, p. 458, an employee in the railway mail service, in good faith and with the consent of the carrier, accepted free passage in interstate transportation from San Francisco to Ogden. This was subsequent to the passage of the Hepburn Act. While en route he lost his life as the result of a train wreck. The Supreme Courts of the United States and Utah each held that this passenger did not forfeit his right to the benefit of the rule of local

law which charges a carrier with the duty to exercise care for the safety of gratuitous passengers.[9]

Is the duty of care to one who rides the train without ticket or free pass greater than to one who rides the train in full compliance with the requirements of the law and company rules?

Point V

Petitioners have been deprived of property without due process of law in violation of the Constitution of the United States.

Immediately upon the deaths of their parents, petitioners became vested with a cause of action for wrongful death. This vested right was property in the constitutional sense of the term. The nature, extent and characteristics of this cause of action were all determined by Utah Law. Amongst the advantages and benefits of this right to re-

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[9] * * * In this connection the court said: 'It is argued (b) that it was beyond the power of the state court to 'read into the Hepburn Act (this paragraph) an exception in favor of gratuitous passengers;' thereby (as is said) enlarging the class to whom Congress limited the right of free interstate transportation. This is ingenious, but, as we think, unsound. As applied to the concrete case, it is equivalent to saying that the operation of the Hepburn act is such as to deprive one who, in good faith and without fraud; and with the consent of the carrier, but in actual though unintentional violation of the prohibition of the act, accepts a free passage in interstate transportation, of the benefit of a rule of local law that renders the carrier in such circumstances responsible for exercising care for the passenger's safety because the carrier has voluntarily undertaken the burden of such care. But the act itself declares what penalty shall be imposed for a violation of its prohibition: 'Any common carrier violating this provision shall be deemed guilty of a misdemeanor and for each offense, on conviction, shall pay to the United States a penalty of not less than one hundred dollars nor more than two thousand dollars, and any person, other than the persons excepted in this provision, who uses any such interstate free ticket, free pass, or free transportation, shall be subject to a like penalty.' This penalty is not to be enlarged by construction. Neither the letter nor the spirit of the act makes an outlaw of him who violates its prohibition by either giving or accepting gratuitous

cover was the fact that by constitutional and statutory enactment and judicial determination it was free from the danger of abrogation from any source whatsoever. Neither the Legislature of the State of Utah, the courts, respondent, or the parents of the petitioners could limit or abrogate this right of recovery by any act, official, personal or otherwise. The Circuit Court of Appeals, contrary to the laws of Utah, abrogated this cause of action by making petitioners' right of recovery dependent upon the existence of an enforcible right in their parents prior to death. This in effect divested petitioners of property contrary to the Fifth Amendment to the Constitution.

The characteristics of the right of action for wrongful death under Utah law have heretofore been explored and discussed at length. Inasmuch as the judgment of the Circuit Court of Appeals is rested upon the contractual provisions attached to the free pass, this contract is significant. The contract purported to relieve respondent from its usual and customary duty in the transportation of passengers, and therefore should be strictly construed.

It was a contract between respondent and the user of the pass, and does not by implication or otherwise purport to deal with the rights or property of others. The contract

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interstate carriage. The deceased no more forfeited his life, limb, or safety, and no more forfeited his right to the protection accorded by the local law to a passenger in his situation, than the carrier forfeited its right of property in the mail car upon which the deceased rode. His right to safe carriage was not derived, according to the law of Utah, from the contract made between him and the carrier and therefore was not deducted from the supposed violation of the Hepburn act. It arose from the fact that he was a human being of whose safety the plaintiff in error had undertaken the charge. With its consent he had placed his life in its keeping, and the local law thereupon imposed a duty upon the carrier irrespective of the contract of carriage. The Hepburn act does not deprive one who accepts gratuitous carriage under such circumstances, of the benefit and protection of the law of the State in this regard."

Southern Pac. Co. v. *Schuyler*, 227 U. S. 601, 57 L. Ed. 662, 43 L.R.A. (N.S.) 901, affirming 37 Utah 581, 109 P. 458.

absolves respondent from liability for injury but does not purport to absolve for death nor does it purport to deal with any cause of action which might come into existence upon the death of the pass user. The fact that the contract does not purport to relieve respondent from liability in the event of death is entirely logical. If the pass user were killed while riding on the pass, he would not have any right of action against respondent. In Utah it has been regarded as settled law since *Mason* v. *Union Pacific R. Co., supra,* that whatever right of action a decedent might have had for injuries sustained by him dies with him and the Wrongful Death Statutes transfer no corresponding right to his personal representative. No doubt the parties to the contract realized and understood this matter of law and made no attempt to deal with rights not possessed by either of them. The contract does not purport to be binding in any way upon the personal representatives or heirs of decedent.

The Circuit Court of Appeals, as did the trial court, enlarged the scope and effect of this agreement and made it determinative of the rights of strangers to the contract in matters not covered by its terms. There is no apparent justification for this unwarranted enlargement. Regardless of the fact that the free pass contract did not purport to absolve respondent from liability for the death of the pass user, the trial court and the Circuit Courts of Appeals nevertheless extended and enlarged the scope of the agreement to the extent of providing absolution to respondent from this liability.

The Supreme Court of Utah, in *Halling* v. *Industrial Commission of Utah, supra,* held that the abrogation of a right of action for wrongful death without the legal consent of the heirs constituted the taking of property without due process of law. "To hold otherwise would be depriving the applicant of property without due process of law" (71 Utah 112, at 122).

It is therefore clear that respondent and the parents of petitioners, acting individually or concertedly, were legally incompetent to abrogate petitioners' cause of action and thereby deprive them of their property without their consent or without legal sanction, but, nevertheless, the courts below have given sanction to a deprivation of this property by the unwarranted enlargement and construction given the pass contract.

There is nothing in the Hepburn Act, its title or any part or portion thereof which can be tortured into a manifestation of congressional intent to abrogate, limit or destroy rights of action for wrongful death created by the laws of the various States. It necessarily follows that the mere exercise of a contractual privilege sanctioned by the Act should not be permitted to enlarge or extend its scope, effect, or intendment. If no such abrogation, limitation or destruction of property, property rights or causes of action was accomplished or intended by the Hepburn Act itself, it must necessarily follow that for greater reason a contract made under sanction of the Act would be insufficient to limit, abrogate or destroy such right of action.

We believe that no authority contrary to this proposition can be found. The *Adams* case does not support a contrary position. As pointed out, this Court gave controlling effect in the *Adams* case to the Idaho Wrongful Death Statute. What is sought here is a decision of this Court giving controlling effect to the statutes of the State of Utah.

In the *Van Zant* case, *supra*, it was held, in a personal injury action, that a limitation of liability on the free pass was effective. The *Van Zant* case, however, was not a death case and the limitation of liability was enforced against one of the parties to the contract. In this case the agreement was held binding upon petitioners who were incompetent to become parties to it. The authority for the Hepburn Act is found in Article 1, Section 8, Clause 3, of the Federal

Constitution, giving Congress power to regulate commerce. The exercise of this power by Congress is, however, subject to the Fifth Amendment.

In *Currin* v. *Wallace*, 306 U. S. 1, 59 Sup. Ct. 379, 83 L. Ed. 441 (1938), this Court stated (306 U. S. 14):

> "Undoubtedly, the exercise of the commerce power is subject to the Fifth Amendment (*Monongahela Nav. Co. v. United States*, 148 U. S. 312, 336, 37 L. Ed. 463, 471, 13 S. Ct. 622, 630; *United States v. Cress*, 243 U. S. 316, 326, 61 L. Ed. 746, 752, 37 S. Ct. 380, 384; *Louisville Joint Stock Land Bank v. Radford*, 295 U. S. 555, 589, 79 L. Ed. 1593, 1604, 55 S. Ct. 854, 863, 97 A. L. R. 1106, 28 Am. Bankr. Rep. (N. S.) 397); * * *"

In exercising constitutional authority to regulate commerce, Congress is powerless to regulate anything which is not commerce as it is powerless to do anything about commerce which is not regulation. *Carter* v. *Carter Coal Co.*, 56 Sup. Ct. 855, 298 U. S. 238, 80 L. Ed. 1160. The power to regulate commerce like the other great substantive powers of Congress is subject to the Fifth Amendment. *Monongahela Nav. Co.* v. *United States*, 148 U. S. 312, 336, 37 L. Ed. 463, 471, 13 Sup. Ct. 622; *United States* v. *Joint Traffic Assoc.*, 171 U. S. 505, 571, 43 L. Ed. 259, 288, 19 Sup. Ct. 25; *Carroll* v. *Greenwich Ins. Co.*, 199 U. S. 401, 410; 50 L. Ed. 246, 250, 26 Sup. Ct. 66; *United States* v. *Lynah*, 188 U. S. 445, 471, 47 L. Ed. 539, 549, 23 Sup. Ct. 349; *United States* v. *Cress*, 243 U. S. 316, 326, 61 L. Ed. 746, 752, 37 Sup. Ct. 380; *Adair* v. *United States* (Ky. 1908), 208 U. S. 161, 28 Sup. Ct. 277, 52 L. Ed. 436; *Standard Oil Co. of Indiana* v. *United States* (Ind., 1908), 64 Fed. 376, *Cert. den.* 29 Sup. Ct. 689, 212 U. S. 579, 53 L. Ed. 659.

It is submitted that even though a congressional intent to limit or abrogate the rights created by Utah Wrongful Death Statutes could be found within the terms and provisions of the Hepburn Act, such act would be to that extent

unconstitutional as clearly appears from the authorities hereinabove cited, but no such intention can be found.

There is nothing in the full enjoyment of the rights claimed by petitioners here which can be regarded as obstructive in any manner whatsoever to the admitted power of Congress to regulate all phases of interstate commerce.

The Circuit Court of Appeals, by its decision, has wrongfully deprived petitioners, who were not parties to the contract of carriage nor to the contractual conditions attached to the free pass, of a most valuable property right. The error thus committed is exaggerated by the fact that under Utah law the parents of petitioners were powerless to lessen, change, modify, abrogate or deal with the property rights or interests which belonged to petitioners. By constitutional provision they were rendered powerless to deal with the property rights in the cause here, a cause brought into existence by their deaths and which had no existence prior thereto. The situation here is not analogous to cases where decedent was contributorily negligent as that defense is imposed by law. The defense here is founded upon contract. Many cases make this distinction and the authorities are collected in 25 C. J. S. 1144, Death, Section 47.[10]

The contract upon which respondent's defense herein is based was entered into long before decedents were killed. The authorities sustain the proposition that ordinarily a

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[10] "• • • However, except in the case of a right based on survival statutes, the logic of the decisions has been questioned, and it has been held that, where the statute creates an entirely new cause of action, distinct and independent of any right of action deceased may have had during his lifetime, a release executed by deceased before his death cannot deprive the beneficiary of the right which the statute gives him • • •." 25 C. J. S. 1144, Death, Section 47.

decedent cannot contract away the statutory rights of beneficiaries by a contract made before injury.[11]

The holding of the Circuit Court of Appeals in this case is contrary to the principle to be followed in the construction of such contracts as announced in the case of *Clark, et al.* v. *Geer*, 86 Fed. 447 (1898).[12]

It is submitted that petitioners have been deprived of property without due process of law. Their property has been taken from them without their consent, and without an opportunity to be heard. They have been deprived of the rights guaranteed them under the *Fifth Amendment* to the

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[11] "Where a contract exemption from liability is deemed valid, and would have afforded a defense to an action by decedent for the injury to him, it is also, in some jurisdictions, a defense to an action for the resulting death. However, the contrary has been held under statutes not making the right of action dependent on the existence of a right of action in decedent, and, in some cases, it has been held, that whether or not decedent could bar the statutory right of action by settlement and discharge made after the injury and before his death, he cannot contract away statutory rights of the beneficiaries by contract made before the injury." 25 C.J.S. 1145, Death.

[12] "• • • The contract involved in the case at bar, as we view it, was one in which the deceased placed a limit upon the amount of damage that would be claimed by himself in case he sustained an injury and sought to recover compensation. Even if it was competent for the deceased to have done so, the contract in question will not bear the construction that he attempted to place a limit upon the amount which might be recovered by his personal representative, suing for the sole benefit of his widow, children, or next of kin, in case he received a fatal injury for which his personal representative could alone sue. The right of action which was sued upon in this case was created by a statute of the state of Kansas (2 Gen. St. Kan. 9187, p. 213) which allows the plaintiffs to recover, for the injuries complained of, any sum not exceeding $10,000. It is a right of action which did not exist at common law, and, without the clearest evidence of such a purpose, we will not presume that the deceased intended to make a contract that would alter the rights of his widow and children or next of kin, as defined by the statute. It is sufficient to say that the agreement upon which the defendant companies rely to limit the damages that may be recovered shows, as we think, that the deceased was contracting solely with reference to a liability of the carrier to himself, and not with reference to the statutory liability of the carrier to others, in case of his death through the wrongful act, neglect, or default of the carrier." *Clark, et al.* v. *Geer*, 86 Fed. 448 (1898).

Constitution of the United States and are left without any remedy whatsoever save this petition.

Point VI

Petitioners were deprived of the right of trial by a jury selected from a cross-section of the community, contrary to the decision of this Court in Thiel v. *Southern Pacific Company, 328 U. S. 217, 66 S. Ct. 984.*

In support of their Motion for New Trial petitioners presented proof by affidavits that the jury panel from which the jury in this case was selected had been drawn contrary to the holdings of this Court in *Thiel* v. *Southern Pacific Company, supra.* In the affidavit filed by one of counsel for petitioners (R. 23, 25) it was declared that lists had been made of the names of all persons called for jury service during the years 1944, 1945 and 1946; that these lists had been delivered to the officers of practically every labor union in the State of Utah and were checked with union membership rolls to determine whether or not union members had been called for jury service during these years, that the officers of 66 union locals had filed affidavits stating that they had checked the lists of jurors against the membership rolls for the years 1944, 1945 and 1946, and that said check revealed the following facts:

Year	*Membership*	*Called for jury service*
1944	32,129	3
1945	31,156	4
1946	31,389	4

Affiant also declared that according to the census reports for Utah 1940 the State had a population of 550,310; that 389,086 were over the age of fourteen years, that 91,784 were employed in private industry, that 12,962 were seeking employment, making a total laboring population of 104,746,

Summaries of the affidavits of Union officers are set forth in the record (R. 26 to 37 inclusive).

At the hearing on the motion for new trial the clerk of the court and the jury commissioner, the officers who select the jurors, were sworn and testified (R. 227). The clerk selects half the names from residents of Cache, Weber and Salt Lake Counties and the jury commissioner selects the other half from residents of the balance of the State (R. 227). The Clerk testified that about half of the names selected by him were secured from Polk directories for Salt Lake City and Ogden (R. 235) and that the other half were chosen by him from amongst persons he knew or met and believed would make good jurors (R. 228), that he also used the names of housewives given by friends upon his solicitation. In determining which names should be selected from the city directory he testified (R. 238):

> "I look at the city directory and I see a man that works for some institution; I think that he must be a man of good moral standing and he must be a pretty good man or perhaps that institution wouldn't have him."

If from the information therein contained he came to the conclusion that the person would make a good juror he put the name in the box. In selecting the names from among persons he knew, he determined whether or not they were good citizens (R. 234):

> "I knew they would be good jurors because good, substantial thinking people."

It appeared that during the three years, 1944, 1945 and 1946, when 11 members of organized labor were called as jurors, 29 bankers, 18 insurance men and 52 merchants were summoned (R. 237). The clerk readily admitted that there were perhaps 100 times more members of organized labor in the State of Utah than bankers, insurance men or

merchants (R. 237), and he could not account for the discrepancy (R. 236, 241). Under Section 48-0-10, Utah Code Annotated, 1943, 14 classes of persons may claim exemption from jury service (R. 229). If one of the names considered appeared to come within any one of the said classifications, the name was not placed in the jury box. It is to be observed that the exemptions provided for in that section are not disqualifications, and persons need not claim such exemption and are eligible for jury service unless they assert their exemption. While it appeared that the clerk had never attempted to obtain names of persons from organized labor (R. 244) nevertheless he did pick business executives from time to time in order to bring about a cross-section of jurors (R. 232).

The jury commissioner selected the names from the less populous areas of the State and testified that during the last two years (1945 and 1946) he had picked the names from lists given him by friends and from convention notices in various papers (R. 252, 253). The commissioner had formerly been the purchasing agent for the Consolidated Wagon & Machine Company (R. 249) and had obtained names of persons who were thought to be good jurymen from the traveling men and branch managers of this concern. In selecting names from newspaper reports of State conventions in Salt Lake, such as cattlemen's conventions and horsemen's conventions, he "took their names for granted that they wouldn't be a member of an association or be a delegate to a convention unless they were up and up" (R. 250). In explaining what he meant by "up and up" the commissioner stated (R. 256):

> "Well, they want to be good citizens, American citizens, and high in the community in which they live and in these country towns where mostly farmers I would imagine a farmer that was a progressive would

make a better juror for the court than one who is shiftless and a tenant or something of that kind."

When the commissioner was asked for an explanation why no members of organized labor in Carbon County were included in the jury list, he stated that he had nothing to say (R. 254, 255). In 1944 there were 3900 members of organized labor in Carbon County; in 1945 4000 members, in 1946 4300 members (R. 34). The commissioner later testified that about two years before he had a branch manager at Price (Carbon County) on whom he relied for names but that since that time he hadn't had any names from that area to speak of (R. 256).

It is submitted that the foregoing testimony establishes that the panel from which the jurors in this case were drawn was hand-picked and did not represent a fair cross-section of the inhabitants of this State. The practice of selecting those whom the jury commissioners think are good substantial thinking people, or who are employed by companies that would only employ good men, or who are "up and up", defeats the constitutional guaranty of trial by a jury drawn from a cross-section of the community.

It seems apparent that the rule announced in the *Thiel* case, supra, was violated by the Federal District Court of Utah in the selecting of juries. Without question the union membership as reflected in the affidavits exceed by many, many times the number of bankers residing in Utah, yet, over the period of three years 29 bankers were called and 11 members of organized labor. It may be that the clerk and commissioner did not intend to reject the working men for jury service but their method of selecting has most effectively excluded them. This Court in the *Thiel* case stated:

> "The American tradition of trial by jury, considered in connection with either criminal or civil proceedings necessarily contemplates an impartial jury drawn from a cross-section of the community. • • •

> "This does not mean, of course, that every jury must contain representatives of all the economic, social, religious, racial, political and geographical groups of the community; frequently such complete representation would be impossible. But it does mean that prospective jurors shall be selected by court officials without systematic and intentional exclusion of any of these groups. Recognition must be given to the fact that those eligible for jury service are to be found in every stratum of society. Jury competence is an individual rather than a group or class matter. That fact lies at the very heart of the jury system. To disregard it is to open the door to class distinctions and discriminations which are abhorrent to the democratic ideals of trial by jury." (66 S. Ct. 984, at page 985).

In the *Thiel* case a city directory was used as a source for obtaining names of prospective jurors and the name of a person discovered to be a longshoreman or daily wage earner was set aside because the clerk believed that he should be excused since the per diem paid for jury service was much less than his daily wage. This Court conceded that the Federal judge would be justified in excusing a daily wage earner because of undue financial hardship but that fact alone should not prevent such person being given an opportunity to serve. Similarly in the case at bar the clerk and commissioner discriminated against the 14 classes of persons who might claim exemption. These persons likewise should be given an opportunity to serve and by the process of selecting used they were completely excluded.

The Circuit Court of Appeals disposed of this contention by holding that the objection was not timely made and that the motion for new trial was not filed within the time specified by *Subdivisions* (b) and (c) of *Rule of Civil Procedure* 59, 28 *U.S.C.A.*, following Section 723.

The whole matter pertaining to the questioned practice in the selection of the jury panel was presented to the trial

court by affidavits and testimony. The trial court decided the question on the merits and denied the motion for new trial. The propriety of the trial court's action was never questioned on appeal. Petitioners appealed from the judgment and from the order of the court denying the motion for new trial. Respondent made no cross-appeal or cross-assignment of errors. Therefore the trial court having considered the matter on its merits the merits should have been considered by the Circuit Court of Appeals.

The fact that the trial court considered the question thus presented upon its merits is analogous to the situation where a trial court considers and entertains a petition for a rehearing on its merits. See *Bowman* v. *Lopereno*, 311 U. S. 262, 61 S. Ct. 201; *Pfister* v. *Northern Ill. Finance Corp.*, 317 U. S. 144, 63 S. Ct. 133. These cases hold that if the court considers the merits of a petition for rehearing not timely filed, effect will be given to such petition in extending the time for appeal. In view of the fact that the trial court entertained and considered the amended motion for a new trial and in particular the assigned ground relating to the manner of jury selection, and in effect denied the motion to strike these portions of the motion and no appeal having been taken from such ruling, the Circuit Court of Appeals erred in refusing to consider the matter on its merits.

The motion for a new trial was filed within time, but was amended after the expiration of the time allowed for filing such motion. The amendment was made before the motion was heard. The trial court at the hearing considered the grounds contained in the motion as originally filed and as amended. There is no limitation of the privilege of amending a motion for new trial in the rules but certainly when

the amendment is made before hearing and no prejudice is shown, such amendment should be considered by the trial court. In any event the matters added by amendment could be considered as particularizing the general ground contained in paragraphs 4 and 16 of the original motion (R. 18, 19) to the effect that there was irregularity in the proceedings of the court and jury and that the court ought to grant a new trial in the exercise of its inherent power to prevent injustice and to secure to all litigants a fair and impartial trial. Such amendment was allowed in *Alcaro* v. *Jean Jordeau, Inc.*, 3 F. R. D. 61.

The Circuit Court of Appeals did not determine whether the method of selecting the jury in this case was proper and in accord with the law as declared by this Court in *Thiel* v. *Southern Pacific Co.* supra, yet it did hold expressly that there was no abuse of discretion in denying the motion for new trial on the stated ground. This Court in the *Thiel* case declared that the American tradition of trial by jury contemplates an impartial jury drawn from a cross-section of the community. It held that prospective jurors should be selected by court officials without systematic and intentional exclusion of any particular group or groups and that recognition must be given to the fact that those eligible for jury service are to be found in every stratum of society. It is inconceivable that a rank and flagrant violation of this rule so clearly laid down by this Court can be revealed as it has been here and yet supported by a holding that there was no abuse of discretion in refusing to grant a new trial on such showing. It should be determined whether or not the jury was improperly selected. If the jury was improperly selected, there can be no question that the trial court abused its discretion by denying the motion for a new trial.

Any other holding would effectively destroy the rule announced by this Court in the *Thiel* case. It would be within the discretion of the trial court to say whether or not a new trial should be granted even though a violation of the rule announced in the *Thiel* case was revealed. The position of the trial court could always be upheld on the theory that there could be no abuse of discretion in denying a party his constitutional right to a jury trial. Respondent did not at any time attempt to uphold the method of selecting the jury panel adopted and followed in the District Court for the District of Utah. Its failure to do so is understandable for the very simple reason that the selection was contrary to the rule announced in the *Thiel* case and respondent's only avenue of escape is that the matter was not raised in time.

Conclusion

It is respectfully submitted that the United States Circuit Court of Appeals, Tenth Circuit, by its decision herein has decided an important question of law arising under the Constitution, statutes and controlling decisions of Utah in a manner in conflict with applicable and controlling State law, and that the Circuit Court of Appeals by its decision has deprived petitioners of property without due process of law in violation of the Constitution of the United States and by its decision has decided an important question of law pertaining to the petitioners' rights to trial by a jury drawn from a cross-section of the community in a manner contrary to the decision of this Court in the case of *Thiel* v. *Southern Pacific Co.*, supra, and that a Writ of Certiorari should be granted in order for this Court to review the record and the opinion of the United States Circuit Court of Appeals, Tenth Circuit, and finally reverse the same and

remand the matter to the court in which the action originated for further proceedings not inconsistent with the law.

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